

CONGRESSIONAL CONTINUITY: ENSURING THE
FIRST BRANCH IS PREPARED IN TIMES OF CRISIS

HEARING
BEFORE THE
SELECT COMMITTEE ON THE
MODERNIZATION OF CONGRESS
OF THE
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CONGRESSIONAL CONTINUITY: ENSURING THE FIRST BRANCH IS PREPARED IN TIMES OF CRISIS

WEDNESDAY, APRIL 6, 2022

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON THE
MODERNIZATION OF CONGRESS,
Washington, DC.

The committee met, pursuant to call, at 9:00 a.m., in Room 1334, Longworth House Office Building, Hon. Derek Kilmer [chairman of the committee] presiding.

Present: Representatives Kilmer, Cleaver, Perlmutter, Phillips, Williams, Timmons, Davis, Latta, and Van Dyne.

Also Present: Representatives Scanlon and Loudermilk.

OPENING STATEMENT OF HON. DEREK KILMER, CHAIRMAN

The CHAIRMAN. Okay. The committee will come to order.

Without objection, the chair is authorized to declare a recess of the committee at any time.

And, without objection, I would also like to welcome our colleagues from the Committee on Rules and the Committee on House Administration to participate in this hearing.

The topics we are focusing on today fall within their jurisdiction, so we wanted to make sure to include them in this discussion. Their participation in the hearing will be limited to the Q&A portion of the hearing.

I now recognize myself for 5 minutes for an opening statement.

One of the least surprising things we will hear today is that no one wants to imagine a future that doesn't involve them. It is why less than half of American adults have a will. And it makes total sense. There is a natural tendency to procrastinate when it comes to planning for anything that is remotely unpleasant, much less catastrophic. It is pretty easy for most people to ignore the consequences of doing nothing when the chances of disaster seem unlikely.

But what about institutions, how do they assess risk and plan for worst-case scenarios? As it turns out, there are a lot of people—the institutions are a lot like people, meaning, they are all over the place. That is true whether we are talking about governments or businesses or schools or other organizations.

State government continuity plans range from detailed to sparse, according to the National Conference of State Legislatures, and foreign legislators are just as inconsistent. Big companies are more likely to have business continuity plans in place compared to medium and small companies, but they vary a lot in terms of their

depth and scope. And as we have seen over the past couple of years, continuity of education very much depends on the school and the district.

The 9/11 attacks did spur a broad movement toward continuity planning, and our recent experience with COVID has reportedly had a similar effect. That is a good thing. The less time institutions devote to reacting, the more time they can spend doing what they are supposed to do.

For Congress, that means working on behalf of the American people. The attacks on 9/11 made clear how vulnerable this institution is. The possibility of a Congress without a Capitol and without its Members is obviously something none of us want to contemplate. But as representatives of the people, we need to. Our essential responsibility is to make sure that the people's voice remains intact no matter the circumstances.

Figuring out how to do that is no easy task, as the experts joining us today well know. Some were involved in the post-9/11 debates around continuity of Congress and will share with us their firsthand perspectives on why this incredibly important issue is so tricky to address.

Our most recent experience with COVID is a reminder that there is still much work to be done. Congress has learned a lot about continuity of operations in the past 2 years, just as it did on the heels of 9/11. And while we all want nothing more than to move on and put the pandemic behind us, Congress should take advantage of this unique moment. Because if we don't, Members will be sitting around 20 years from now, trying to make sense of what happened and why, just like a lot of us are doing today with regard to 9/11. That is a disservice to the American people.

The bottom line is that if Congress can't function, our constituents lose their voice in government. That is a core principle of representational democracy that should be preserved. A Congress that can't function also opens the door to unilateral executive branch control which defies constitutional intent.

So today is about restarting that conversation. The experts joining us will provide background and perspective on the measures Congress adopted after 9/11 to ensure continuity of representation. They will also discuss the current effectiveness of those measures and whether they think additional steps need to be taken or adjustments made. I am looking forward to a good discussion.

The committee will once again make use of our committee rules that give us the flexibility to engage in extended discussion in the civil exchange of ideas and opinions. In accordance with clause 2(j) of House rule XI, we will allow up to 30 minutes of extended questioning per witness. And, without objection, time will not be strictly segregated between the witnesses which will allow for extended back-and-forth exchanges between members and the witnesses.

Vice Chair Timmons and I will manage the time to ensure that every member has equal opportunity to participate. Any member who wishes to speak should just signal their request to me or Vice Chair Timmons.

Additionally, members who wish to claim their individual 5 minutes to question each witness pursuant to clause 2(j)(2) of rule XI

will be permitted to do so following the period of extended questioning.

Okay. I would like to now invite Vice Chair Timmons to share some opening remarks as well.

**OPENING STATEMENT OF HON. WILLIAM TIMMONS, VICE
CHAIRMAN**

Mr. TIMMONS. Thank you, Mr. Chairman.

First, I just want to say thank you all for coming today. This is a very, very complicated issue, and we are going to spend some time digging in on it.

I am going to begin by just talking about this committee. We try to make Congress better. We try to modernize Congress. That is our mission, more effective, efficient, and transparent for the American people.

We start with what is the problem, and then we try to figure out a way to solve the problem. Let's take staffing, for example. We have made a number of recommendations there. I think the biggest ones are decoupling Member pay to allow us to pay our senior staffers more and increasing the MRA to give Members more resources to compensate staff better, keep them here longer. A number of other recommendations.

We have made a lot of progress, we can keep going, but that is the model. So let's start with, what is the problem? The problem is, after 9/11, we dug deep and tried to figure out what we would do in a worst-case scenario.

The way I see it is there is two types of problems. One, there is policy issues. Does anybody think it is a good idea that if enough members in the majority party were to meet an untimely demise, that a motion to vacate the chair could switch the balance of power, have a new Speaker for 100 to 150 days? That is just a policy question. I don't think that is—that is not the way it should be, but that is the way it currently is. So we got to start with what is the problem. So that is the policy.

Then we have procedural—potential procedural legal challenges to continuity of Congress. So worst-case scenario, designated survivor kind of situation. We have all seen the show. You have the designated survivor off, and he is getting sworn in as Acting President. You got 30 Members of Congress who are sitting here, saying, well, we are going to elect a Speaker. That new Speaker then is going to say, I am the President, and the designated survivor is going to say, Well, are you? Like, you had 30 Members of Congress elect you Speaker. That is not a quorum. So then they are going to say, well, let's go to the Supreme Court. Ooh, there is no Supreme Court. What do we do?

So that is just a problem. And I am really looking forward to figure out whether we agree that is a problem, whether that is actually what would happen, or if we need to make recommendations to change it to address that.

So I am looking forward to this hearing. I really appreciate you all being here.

And, with that, Mr. Chairman, I yield back.

The CHAIRMAN. Thank you, Vice Chair Timmons.

I am honored to welcome four experts who are here to share with us their experiences, perspectives, and ideas for how to ensure congressional continuity in the event of a catastrophe or emergency. We also have a couple of others who aren't going to have opening remarks but are going to be available to also share their wisdom with us.

Witnesses are reminded that your written statements will be made part of the record.

Our first witness is George Rogers. Mr. Rogers spent 14 years working for the U.S. House and U.S. Senate. He served as general counsel to the House Committee on Rules and as counsel at the House Oversight and Government Reform Committee. He began his public service career working for former Senate Foreign Relations Committee Chairman Richard Lugar.

Mr. Rogers, thank you for being with us. You are now recognized for 5 minutes.

STATEMENTS OF GEORGE ROGERS, FORMER GENERAL COUNSEL FOR THE HOUSE RULES COMMITTEE; AND DOUG LEWIS, FORMER ELECTION CENTER EXECUTIVE DIRECTOR

STATEMENT OF GEORGE ROGERS

Mr. ROGERS. Thank you, Mr. Chairman.

Chairman Kilmer, Vice Chair Timmons, and members of the committee, and my distinguished fellow panel members, it is an honor to appear before you here today.

I was privileged, as you said, to serve as the general counsel for the Rules Committee right after the 9/11 terrorism. It was a time of self-examination when the words "homeland security" took on a whole new meaning.

At the time, I was assigned three major projects to assist Members. First, to create the Committee on Homeland Security; second, to look at our rules and procedures for continuity; and third, to help enact the expedited uniform special elections bill.

I would like to also point out how delighted I am to be working with such prestigious people on this panel, and I am referring specifically to the distinguished Madam Secretary Shalala. Even though we are probably on different sides of this issue, we both don't view it as partisan.

And I would also like to note that the President of the United States gave her the Medal of Freedom, a well-deserved honor, and thank you.

I will be brief as my written testimony contains details. The 9/11 attack focused the minds of House Members on continuity. Continuity in Representation Act and the provisional quorum rule work in tandem to ensure only elected Members of the House exercise power in the people's House. The members followed the father of the Constitution, James Madison's, view that where elections end, tyranny begins.

First, they provided a mechanism for Members killed by terrorism or catastrophe to be replenished by uniform special elections. Uniformity is important, and I think today we will probably end up talking about the number of days and all those sort of things. But it needs to be uniform so you can avoid the Sturm und

Drang of multiple elections occurring at multiple times, as Mr. Timmons mentioned, back-and-forth power shifts. That kind of turmoil is something the House needs to avoid. The people of America don't need to have that happen.

Second, the principals decided to address what is called the quorum trap, what to do if a majority of Members are unable to act because of incapacitation. The problem is that if you are elected, sworn, living, and incapacitated, you are still part of the denominator for the quorum, and you can quickly figure out that there are problems there if you can't get a quorum.

The rule creates a multistep process to allow action by those Members able to respond. In that sense, it is an objective way of going about the issue. The Cox-Frost task force and the committee that I worked for both looked at how to define incapacitation, but instead we came up with a rule. If Members can respond, that is how you define the quorum.

The 103rd Congress also held a hearing and floor action on a constitutional amendment, which I am sure we will talk about today. The distinguished Americans on this panel have long believed in a constitutional amendment. We considered a constitutional amendment in the Congress. Two-thirds affirmative vote was required. Sixty-three Members voted for it.

In contrast, the Continuity in Representation Act was considered over two Congresses. In the 108th Congress, it passed with 306 votes. In the 109th—excuse me—yes, in the 109th Congress, it passed with 329 votes. Became Public Law 109-55 and was codified into United States Code, Section 8.

At no time in history of the Republic has the House been appointed—not in the Constitutional Convention when the issue was decided 9-2, not during the pandemic commonly known as the Spanish flu, not during wars that threaten the survival of our Nation, and not during a nuclear attack threat during the Cold War—to not have uniform special elections risks special elections called at different times for potential partisan gain.

And then there is the matter of former Governor Blagojevich who tried to sell a Senate seat.

On the provisional quorum rule, it utilizes constitutional rule-making powers recognized by the Supreme Court. The rule focuses on the abilities of Members themselves to respond to multiple-day quorum calls as well as reports that include input from the Sergeant at Arms, the Clerk, the Attending Physician to Congress, public health officials, and law enforcement.

I would note that the then-minority objected primarily to the lack of concurrence of the minority in effectuating the provisional quorum. There are very few, if any, powers of concurrence in the House rules.

In closing, the Congress provided for a uniform expedited special elections and prevented the quorum trap. One question not answered is what to do if all the Members are killed or incapacitated.

Rather than appointments, you could consider elected continuity officers for each State, who would then serve until uniform expedited special elections occur. I have some more thoughts on that if we get into it in the questions.

Were a constitutional amendment done, it would take years for the people's House to have its provisions go into effect, and the people's House needs to be able to act immediately. So another question that is left unanswered is, what do we do while we are waiting for the constitutional amendment to go into effect?

I welcome your questions. And, again, I thank the select committee for inviting me here and for this important inquiry. Thank you.

George Robb Rogers

Former General Counsel, Committee on Rules &
Managing Partner, Republic Consulting, LLC

Before the

Select Committee on the Modernization of Congress

Hearing on

**“Congressional Continuity: Ensuring the First Branch is Prepared
in Times of Crisis”**

April 6, 2022

Written Statement

Introduction

The terrorism of 2001 and the pandemic of 2020 have brought trenchant focus on the resiliency and continuity of government institutions. For all of that time, and indeed if one goes back to the Constitutional Convention of 1787, there has been a debate about the expediency of appointments vs. the legitimacy of elections for the United States House of Representatives. I anticipate today the Select Committee will hear from other witnesses, as other committees and Congresses have, about the alleged need for a Constitutional Amendment allowing for appointments to replace Members of Congress tragically killed or incapacitated.

Yet in every case when these issues were given serious consideration by the Members who went before you, from 1787 to the present, the House has overwhelmingly supported elections in order to serve as a Member of Congress.

It is true that the U.S. Senate has attempted to push its preferences for appointments on the House in the past. That is ironic, as each body is its own judge of those who may serve in it. But more than ironic, it is troubling if you look at the debates of the past and at those that the author witnessed in the aftermath of the 9/11 attack.

In the 1787 Constitutional Convention, some delegates wanted appointments for the House. However, founding fathers James Madison, Alexander Hamilton, George Mason, and others prevailed in having direct election by the people for House Members. As Madison said, “Where elections end, tyranny begins.”¹

Madison spent considerable time thinking about the need for a lower body of the Congress that represented the national will of the people, knowing that the upper body would represent the States. Interestingly, Madison was joined in this view by Anti-Federalist George Mason, when he said, “The people will be represented; they ought therefore to choose the representatives.”²

Madison explicitly rejected appointments when he said, “The right of suffrage is certainly one of the fundamental articles of Government and ought not be regulated by the legislature. A

¹ THE FEDERALIST NO. 53.

² <http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/index.php>

gradual abridgement of this right has been the mode in which Aristocracies have been built on the ruins of popular forums.”³

While many who focus on these topics look to documents such as *The Federalist* papers – which are an outstanding source for the thinking of Founding Fathers – one also should look at the *votes* that have occurred on these issues.

As described in the 103rd Congress by the Members of the Committee on House Administration in their seminal work, **The History of the United States House of Representatives**:

Next, attention turned to who should choose Members of the House—the people or the state legislatures? This question was twice debated in the Committee of the Whole and **twice decided in favor of election by the people** of the several states. Some prominent delegates, like Roger Sherman of Connecticut and Elbridge Gerry of Massachusetts, distrusted the people and feared an excess of democracy, but the majority favored popular election. James Madison said he “considered the popular election as essential to every plan of free government.” George Mason of Virginia asserted that the House “was the grand depository of the democratic principles of the Government. . . . The requisites in actual representation are that the Representatives should sympathize with their constituents; should think as they feel; and that for these purposes should even be residents among them. **When this question came before the Convention in final action, nine states voted for election of the people, two dissented, and one divided.**”⁴

The author finds it salient to the Select Committee that 2 of 12 states to the Convention were against the House being elected by the people, and they favored of appointments. Thus 16.7% were in support of appointments while 75% were for popular elections to serve in the House.

The founders of our nation faced existential crises too. The new nation had to deal with the intrigues of other nations, difficulties with finances, the prospect of open war with one of the

³ James Madison, “Speech in the Federal Convention for Suffrage,” August 7, 1787.

⁴ Max Farrand, **The Records of the Federal Convention of 1787**, vol. 1, 48-49, 133-34, 365, *quoted in History of the United States House Representatives*, HOUSE DOCUMENT NO. 103-324, 5 (Committee on House Administration, 1994)(*emphasis added*) .

most powerful nations on Earth at the time, battles internally, limited and uncertain trade routes, crop failures, pestilence, and more. Yet despite these challenges and ones such as the War of 1812's sacking of the Capitol, the Civil War, World War I, the Spanish Flu Pandemic, World War II, the Cold War and its Cuban Missile Crisis, and many other moments when the House could have taken up appointments through a Constitutional Amendment, it has *always* rejected appointments in favor of popular elections.

In the aftermath of the 9/11 terrorist attack, the House once again took up the question of appointments of its Members. The AEI Commission, a group of outstanding individuals who have offered advice to the Congress, recommended a Constitutional Amendment allowing for the appointment of House Members in the event of a catastrophic attack or other calamity.

As these and other ideas were fomenting, the then-Chairmen of the Rules and Judiciary Committees, Representatives Dreier (R-CA) and Sensenbrenner (R-WI) respectively, were charged by the then-House Majority Leadership to provide for the Continuity of Congress. The author worked intensively with both, as well as with the bipartisan House Leadership, to help craft solutions that would preserve the House in a time of crisis – and preserve the unbroken requirement – that the Members of the House are elected by the people to be a national legislative body.

Consideration of the Constitutional Amendment for Appointments in 2004

During this time, the Representative Baird (D-WA) offered a Constitutional Amendment harmonious with the recommendations of the AEI Commission. H.J. Res 83, "Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to fill vacancies in the House of Representatives" received a mark-up in the committee of jurisdiction, the Judiciary Committee, and it was considered on the floor of the House.

The House considered H.J. Res 83 on June 2, 2004. The yeas and nays were requested, and the Constitutional Amendment failed on a vote of 63-353⁵. Some key points about the vote:

- Under Article V of the Constitution, constitutional amendments require support of 2/3 of those present and voting, a quorum being present;⁶
- 418 Members voted in Roll Call Vote #219;

⁵ Roll no. 219, 108th Congress, <https://clerk.house.gov/Votes/2004219>.

⁶ CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE REPRESENTATIVES, HOUSE DOCUMENT NO. 116-177, § 192 (2021).

- 2/3 of 418 = 279 Members. The 63 Yea votes for the Constitutional Amendment were 216 votes short of the amount necessary for passage; and
- The 63 votes for H.J. Res. 83 out of 418 Members voting = 15.1%.

In a parallel of the Constitutional Convention, where 16.7% supported appointments over elections, 15.17% of the House did so in 2004.

Having decided to continue with all House Members serving only upon election by the people, the House next turned to the *Continuity in Representation Act*.⁷ The law provides that there will be expedited special elections to replenish the House in the case of a catastrophe resulting in more than 100 Members being killed. The official summary of the legislation from the Congressional Research Service (CRS) is:

Continuity in Representation Act of 2005 - Amends Federal law concerning the election of Senators and Representatives to require States to hold special elections for the House of Representatives **within 49 days after a vacancy is announced by the Speaker of the House in the extraordinary circumstance that vacancies in representation from the States exceed 100**. Waives the 49-day requirement if, during the **75-day period** beginning on the date of the vacancy announcement, a regularly scheduled general election or another special election for the office involved is to be held.

Requires determination of the candidates who will run in the special election: (1) not later than ten days after the vacancy announcement by the political parties authorized by State law to nominate candidates; or (2) by any other method the State considers appropriate.

Sets forth requirements for judicial review of any action brought for declaratory or injunctive relief to challenge such a vacancy announcement. Requires a final decision within three days of the filing of such an action. Makes a final decision non-reviewable.

Requires a State, in conducting a special election under this Act, to ensure to the greatest extent practicable (including through the use of electronic means) that absentee ballots are transmitted to absent uniformed services voters and overseas voters not later than 15 days after the Speaker of the House announces that the vacancy exists. Requires a State to accept and process any otherwise valid ballot or other election material from an absent uniformed services voter or an overseas voter, as long as the ballot or other material is received by the appropriate State election official not later than 45 days after the State transmits it to the voter.⁸

⁷ See <https://www.congress.gov/bill/109th-congress/house-bill/841>.

⁸ <https://www.congress.gov/bill/109th-congress/house-bill/841> (*emphasis added*)

The *Continuity in Representation Act* further enshrines the Constitution's requirement that the House shall "be composed of Members chosen every second year by the people."⁹ The strength of this *Continuity in Representation Act* is that it continues the more than two hundred years of practice of every person serving in the House of Representatives being elected. No other part of the United States Government can say that. **In a national crisis, if the House were to allow for appointment of its Members, it is conceivable that an appointed President, an appointed Senate, and an appointed House could be making decisions crucial to our democracy.**

The legislation reflects the vision of the founders of our nation and resonates in modern times. In the first article of the Constitution, the Congress is given power over "the times, places, and manner" of elections. As interpreted by the United States Supreme Court, the "times, places, and manner" clause contained in Article I, section 4 is no less than the:

[A]uthority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protecting of voters, prevention of fraud and corrupt practices, counting of votes . . . [and] making and publication of election returns.¹⁰

The *Continuity in Representation Act* specifies how and when elections will occur if the nation faces mass deaths (vacancies) in the House. If more than 100 Members, that is, nearly one-quarter of the House or more, are killed by a catastrophic event, then the House will be replenished by expedited special elections that occur within a **uniform** number of days.

States have many different treatments for special elections when a vacancy occurs without a time of mass catastrophe. However, in a time of extreme crisis, it is important to have uniformity in replenishing the House. If elections occur in a haphazard fashion, we could see the balance of power shift back and forth daily or weekly for many months. Speaker elections and Chairmanships would become paramount, rather than the business of the people in a crisis.

This legislation, as well as the change to the House Rules for a Provisional Quorum contained in clause 5(a), of House Rule XX, in the case of the mass incapacitation of Members, were considered in the regular order by the committees of jurisdiction and by the full House.

Legislative History of the Continuity in Representation Act (108th Congress):

- The *Continuity in Representation Act* (H.R. 2844), introduced by Rep. Sensenbrenner (R-WI) received a legislative hearing by the committee of jurisdiction, the House Administration Committee (CHA), on 9/24/2003;
- CHA considered, marked-up, and ordered favorably reported H.R. 2844 with an amendment by a vote of 4-3 (H. Rept. 108-404, part I), 12/8/2003;
- The Committee on the Judiciary, under its sequential referral, considered, marked-up, and ordered favorably reported with an amendment H.R. 2844 by a vote of 18-10 (H. Rept. 108-404, part II, 1/28/2004);

⁹ U.S. Const., Art. I, § 2.

¹⁰ *Smiley v. Holm*, 285 U.S. 355 (1932).

- The Committee on Rules held a hearing and reported a special order of business (“rule”) for the consideration of H.R. 2844. H.Res. 602 made amendments in order and provided a motion to recommit with or without instructions on 4/21/2004;
- The House adopted H.Res. 602 by voice vote on 4/22/2004;
- The House considered four amendments made in order under the rule:
 - H.Amdt. 515, offered by Rep. Larson (D-CT) sought to increase from 45 days to 75 days the maximum time allowed to conduct the expedited special elections. Amendment failed by a recorded vote of 179-229 (Roll no. 128);
 - H.Amdt 516 offered by Rep. Larson (D-CT) sought to delete provisions of establishing a 10-day deadline for parties to nominate candidates in a special election and substitutes language that provides that candidates would be eligible to run in a special election if candidates meet the requirement to get on the ballot as set by state law; and it would allow states to extend the deadline for special elections. Amendment failed by a recorded vote of 188-217 (Roll no. 129);
 - H.Amdt 517 by Rep. Maloney (D-NY) that requires States to provide overseas voters 45 days to return their ballots from the date on which the ballot is mailed. Amendment agreed to by voice vote; and
 - H.Amdt. 518 by Rep. Schiff (D-CA) which sought to extend the amount of time for an action to be filed in court with regard to the Speaker’s announcement of a vacancy; and modify the language concerning appeals of a court decision. Amendment failed by voice vote.
- A motion was made by Rep. Baird (D-WA) to strike the enacting clause, but it was subsequently withdrawn.
- H.Amdt 519, a motion to recommit with instructions offered by Rep. Watt (D-NC) to the Committee on House Administration to *forthwith* amend H.R. 2844 that nothing in the legislation may be construed to affect the application of special election of any Federal law governing the administration or enforcement of elections. Adopted by voice vote.
- The House passed H.R. 2844 in an overwhelmingly bipartisan vote of 306-97 (Roll no. 130¹¹ with 202 Republicans and 104 Democrats voting Yea.)

The Senate did not consider H.R. 2844 prior to *sine die* of the 108th Congress.

Legislative History of the Continuity in Representation Act (109th Congress):

- The *Continuity in Representation Act* (H.R. 841), re-introduced by Rep. Sensenbrenner (R-WI), was considered, marked-up, and favorably reported by the House Administration Committee (CHA) by voice vote (H. Rept. 109-8 on 2/24/2005);
- The Committee on Rules held a hearing and reported a special order of business (“rule”) for H.R. 841, making specified amendment in order, and providing a motion to recommit with or without instructions (H.Res. 125 on 3/1/2005);
- The House adopted H.Res. 125 by voice vote on 3/3/2005;

¹¹ <https://clerk.house.gov/Votes/2004130>

- The House considered the following amendments were considered under the rule on 3/3/2005:
 - H.Amdt. 17 offered by Rep. Ney (R-OH) to extend the maximum time for expedited special elections to 49 days (7 full weeks). Agreed to by voice vote.
 - H.Amdt. 18 offered by Ms. Millender-McDonald (D-CA) which sought to change the overall deadline for holding expedited special elections from 49 to 60 days. Amendment failed by recorded vote 192-229 (Roll no. 49); and
 - H.Amdt 19 offered by Rep. Jackson-Lee (D-TX) sought to expand the ability of filing suits for declaratory or injunctive relief from 2 days to 5 days; provide for an expedited appeals process; and provide for expansion of the right to sue for declaratory judgement to others beyond a State Governor. Amendment failed by a recorded vote of 183-239 (Roll no. 50);
- A motion was made to strike the enacting clause by Mr. Baird (D-WA), but it was subsequently withdrawn;
- A motion to recommit the bill with instructions to the Committee on House Administration was made by Rep. Conyers (D-MI). The motion failed by a recorded vote of 196-223 (Roll no. 51);
- The House adopted H.R. 841 by voice vote. However, upon unanimous consent the voice vote was laid on the table and a recorded vote was demanded by Rep. Millender-McDonald on the question of the passage of the bill; and
- The House – with a larger bipartisan margin than the 108th Congress – passed the *Continuity in Representation Act* by a vote of 329-68 (Roll no. 52)¹² with 206 Republicans and 122 Democrats and 1 Independent voting Yea, on 3/3/2005).

The House and Senate adopted the *Continuity in Representation Act* as a part of the *Legislative Branch Appropriations* bill for FY 2006, and the President signed it into law.

Mass Incapacitation of Members

The House, having acted to preserve the continuity of government in the case of mass **deaths** of Members through expedited special elections with the enactment of the *Continuity of Representation Act*, next turned to the question of dealing with the “Quorum Trap” in the case of **mass incapacitation** of Members.

The thorny question of how to define incapacitation was intertwined with the question of how to have a sufficient quorum to do business. The Congress began to wrestle this issue in the 107th Congress. The bipartisan Cox-Frost Task Force, headed by former Republican Policy Committee Chairman Cox (R-CA) and Democratic Caucus Chairman Frost (D-TX) with a number of Members, including Rules Committee Chairman Dreier and Representatives Hoyer (D-MD), Chabot (R-OH), Nadler (D-NY), Ney (R-OH), Baird (D-WA), Vitter (R-LA), Jackson-Lee (D-TX), and Langevin (D-RI). The Task Force looked into the Continuity of Congressional

¹² <https://clerk.house.gov/Votes/200552>.

operations. Many of the recommendations of the Cox-Frost Task Force were adopted at the start of the 108th Congress (2003-04). These included:

- (1) requiring the Speaker to submit a list of designees to serve as Speaker pro tempore for the sole purpose of electing a new Speaker in the event of a vacancy in the Office of the Speaker (clause 8(b)(3) of rule I);
- (2) providing for Members to serve as Speaker pro tempore in the event of the incapacitation of the Speaker (clause 8(b)(3) of rule I);
- (3) enabling the Speaker to suspend business in the House by declaring an emergency recess when notified of an imminent threat to the safety of the House (clause 12(b) of rule I);
- (4) allowing for House Leadership to reconvene the House earlier than a previously appointed time (clause 12(c) of rule I); and
- (5) authorizing the Speaker to convene the House in an alternative place within the seat of Government (clause 12(d) of rule I).

The Cox-Frost Task Force also looked at the issue of rule change for incapacitation of Members, but an impasse was reached over how to define incapacitation of Members. The Task Force decided to allow for more analysis of the difficult question.

On April 29, 2004, the Committee on Rules held an original jurisdiction hearing on the Mass Incapacitation of Members and on the proposal to create a new rule of the House to adjust the quorum in times of national crisis. Attending the hearing were: Chairman David Dreier (R-CA), Ranking Member Martin Frost (D-TX), and Rules Committee members Reps. John Linder (R-GA), Jim McGovern (D-MA), and Richard “Doc” Hastings (R-WA). Testifying at the hearing were a number of experts on the House Rules and precedents, the Constitution, and the issue of incapacitation: (1) then-House Parliamentarian, Charles Johnson; (2) then-Capitol Physician, John Eisold M.D. and Rear Admiral, Medical Corps, U.S. Navy; and (3) eminent Constitutional scholar, Walter Dellinger. Also testifying were the then-Deputy Parliamentarians John Sullivan and Tom Duncan and the author, then the General Counsel of the Committee on Rules.

The underlying premise of the hearing and the rules change was the Congress needed to assure the American people everything was being done to provide for the continuity of government in the face of any catastrophic event. After years of looking at the question of incapacitation, the Congress took up a solution: **Provisional Quorum**. From the outset there were questions about the ability to act via rule, since the quorum requirement is set in the Constitution as a majority. At the Rules Committee hearing, experts testified that it is far better to have in place a rule *prior* to facing a crisis than to create them ad-hoc. Having a well-reasoned plan and rule adopted under the regular order is far better than no plan at all. As constitutional scholar Walter Dellinger said:

I think there is a great advantage to adopting a rule now if we can get really widespread and bipartisan agreement on it, because you are acting now behind what one of the philosophers calls the ``veil of ignorance." You don't know whose party is going to be benefited, whose faction is going to be burdened by this. You don't know. What we really want to ensure in that time, as I think [Ranking Member] Frost and . . . Chairman [Dreier] said, is legitimacy.¹³

House Parliamentarian Charles Johnson also testified:

[T]he Constitution empowers each House to adopt and interpret its own rules . . . [T]he House should consider--preferably in advance--what it might do in the event of such a catastrophe, addressing the contingency by a change in the standing rules adopted by the whole House in a dispassionate atmosphere with a proper quorum present. The constitutional advisability of such a rules change initially would be for the House, in its collective wisdom, to debate and determine by its vote on the proposal.¹⁴

Central to the hearing was the concept of the “*Quorum Trap*” and the ability of the House, under its Constitutional authority to set its own rules, to provide a rule for its continuing operations when a catastrophe has struck the body.

The “Quorum Trap” is the inability of the House to act if large numbers of Members are alive but incapacitated. The Framers of the Constitution rejected the idea of the British Parliament’s smaller number of Members constituting a quorum and instead required a majority of Members in Article I, Section 5. Subsequent House precedent has defined quorum as Members “elected, sworn, and living.” If more than 218 Members are incapacitated, the House cannot act. Because they are elected, sworn, and living – even though incapacitated and unable to vote – they remain part of the denominator for determining a quorum.

For example, if 175 Members are on respirators and unable to vote, the whole number of the House being 435, quorum is 218, and there are 260 Members able to vote and business continues. However, if 300 are incapacitated, the whole number remains 435 and the quorum 218, yet only 135 Members are able to vote. In this situation, quorum traps the House and renders it unable to do business.

Longstanding House precedent, codified in clause 5(c) of rule XX, empowers the Speaker to adjust the whole number of the House, and thereby its quorum, upon the *death or resignation* of Members. If a catastrophe strikes and 225 Members are killed, the whole number of the House would be reduced to 210. The Speaker under the rules would announce that fact to the House, and the quorum of the House would reset to 106. The House can continue to do business under its rules if large numbers of Members are *dead*. The question that needed to be answered was can

¹³ *Continuity of Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Before the Comm on Rules*, 109th Cong. 31 (April 29, 2004)(GPO DOCUMENT NO. 95-383, <https://www.govinfo.gov/content/pkg/CHRG-108hrg95383/html/CHRG-108hrg95383.htm>).

¹⁴ *Id.*, at 16.

the House rules allow the House to continue to do its business if large numbers of Members are *incapacitated*.

The power of the House to adjust its rules, including quorum, was affirmed by the Supreme Court in the *Ballin* case. The Court in *Ballin* was asked to determine if the Speaker of the House unconstitutionally counted for purposes of quorum Members who refused to answer a quorum call in an attempt to stop the business of the U.S. House of Representatives. The Court held the Speaker could do so, stating that:

[N]either do the advantages or disadvantages, wisdom or folly, or such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings. . . . But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the House to prescribe any method which shall be reasonably certain to ascertain that fact.¹⁵

Dellinger also testified in the hearing about the need and power of the House to do the Provisional Quorum rule change, stating:

The legislative powers that Article I vests in Congress would be absolutely critical for our nation to respond to the type of calamity that the rule change is designed to address.

It is simply inconceivable that a Constitution established to 'provide for the common defense' and 'promote the general welfare' would leave the nation unable to act in precisely the moment of greatest peril. No constitutional amendment is required to enact the proposed rule change because the Constitution as drafted permits the Congress to ensure the preservation of government.

In fact, a functioning House is so critical in times of emergency that, one way or another, it would necessary, if much of the House were incapacitated, for the remainder to find a way to continue to function.¹⁶

While the Supreme Court in *Ballin* affirmed the power of the House to determine its rules of proceeding, the Court and the Constitution are silent on the question of what

¹⁵ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

¹⁶ *Continuity of Congress*, *supra* note 13, at 34-35.

constitutional scholar Paul Taylor posits as “a ‘majority’ *of what?*”¹⁷ As Taylor explains:

[W]hile the Constitution does specifically provide that “a smaller number” than a “majority” can adjourn the House and compel absent Members to attend, the Constitution itself still does not definitively answer the question: a “majority” *of what*. That is, “less than a majority” may mean, under the House Rules, “less than a majority of living and capacitated Members.” The answer to the question “a majority of what?” may remain in the House’s [power] to give [an answer to] under its authority to “determine the Rules of its Proceedings.”¹⁸

At the 2004 hearing, Chairman Dreier noted at the outset one of the key questions that the Select Committee on the Modernization of Congress will consider today: “The Constitution sets the majority quorum requirement, and some believe [the mass incapacitation question] is an important issue that requires a constitutional approach.”¹⁹ However, Chairman Dreier was very hesitant to touch the Constitution and stated the Framers of the Constitution anticipated the need to act in times of crisis:

In Federalist 23, [Alexander Hamilton] said, “It is impossible to foresee or define the extent and variety of national exigencies and the corresponding extent and variety of the means which may be necessary to satisfy them. Circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can be wisely imposed. I believe that the Constitution was adopted to facilitate the functioning of representative government, not to be a stumbling block, particularly in times of national crisis.”²⁰

Then-Deputy Parliamentarian of the House John Sullivan, who subsequently became the Parliamentarian of the House, described the purpose and mechanics of the provisional quorum rule as follows:

[T]o establish a procedure that will let the circumstances produce a change in the denominator of the quorum requirement and let the circumstances largely speak for themselves. The method that it chose is to use the ability of Members to attend the Chamber as a measure of who exists or who is available for duty. It sets up a series of hurdles in which the House tries real hard to gather a real quorum among the 435-seat House--218--and in stages. You don't move on to the next stage unless a quorum is wanting.

The first step is that there be revealed the absence of a quorum, perhaps on a normal vote by the ayes and nays, if fewer than 218 are recorded either yes or

¹⁷ Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 451 (2004)(*emphasis original*).

¹⁸ *Id.*

¹⁹ *Continuity of Congress*, *supra* note 13, at 4.

²⁰ *Id.*

no or present. After that, the rule for this provisional number might be used to actually produce a result.

The next step that has to be exhausted is the use of one of the motions to compel the attendance of Members. One of the things that the Constitution allows [is] a number smaller than a majority to do in the House, under the Rules of the House, 15 Members can dispatch the Sergeant at Arms to round up absentees.

So those first two steps, the failure of a quorum in the first instance, and the exhaustion of an attempt to compel the attendance of Members, sets the stage for the three real hurdles of the process: a staged first lengthy quorum call. There will [be] a plan for its length, but some real hard attempt to gather 218. . . If this five-stage process goes through to its fruition, then the bottom line of the rule is that it cranks out a provisional number of the House, some number to use instead of 435.

And so if, after all of these very sincere attempts to gather as many Members as possible, the House is left with 100, then that would be the provisional number of the House, and a quorum would be 51.

It uses the circumstances, the ability of Members to respond, as a way of judging what has become of the House. The technique that is used here is to employ tools that don't require a quorum, so we don't get trapped in a circle.

One of them is the Speaker's unappealable invocation in the fourth step, the entry of the finding that catastrophic circumstances are afoot. The other is the ubiquitous availability of a possible motion to adjourn adoptable by a majority of whoever is there.

That is the chief strength, that is the chief protection in this discussion draft is that--well, first of all, the procedure can't be triggered accidentally. You have to really try to get into this machine. It is multi-staged for that purpose. And the ultimate strength is it can be aborted simply. It can be aborted during the first lengthy quorum call by adopting a motion to adjourn, or wait, even if you were to wait and see whether the Speaker were going to make the invocation, that same tool is contemplated during the second lengthy quorum call.

The Members could say, we think that we should take a breather here. And a motion to adjourn would wind the clock back to zero on this whole process.

The House would come in on whatever day it adjourned to and be in the same position it was before.²¹

After the Committee on Rules hearing on mass incapacitation, the bipartisan discussions continued for the rest of 2004 and led to a number of improvements to the proposed Mass Incapacitation rule from Representatives of both the Minority and Majority parties.

At the start of the 109th Congress in 2005, H.Res. 5, which is the resolution containing the rules of the House for that Congress (a.k.a., “The Rules Package”) included the Provisional Quorum rule. This rule has been continuously adopted by each succeeding Congress including the current 117th. Clause 5(c) of rule XX, as first adopted in 2005, states:

Provisional Quorum.--In clause 5 of rule XX, redesignate paragraph (c) as paragraph (d) and insert after paragraph (b) the following new paragraph:

“(c)(1) If the House should be without a quorum due to catastrophic circumstances, then--

“(A) until there appear in the House a sufficient number of Representatives to constitute a quorum among the whole number of the House, a quorum in the House shall be determined based upon the provisional number of the House; and

“(B) the provisional number of the House, as of the close of the call of the House described in subparagraph (3)(C), shall be the number of Representatives responding to that call of the House.

“(2) If a Representative counted in determining the provisional number of the House thereafter ceases to be a Representative, or if a Representative not counted in determining the provisional number of the House thereafter appears in the House, the provisional number of the House shall be adjusted accordingly.

“(3) For the purposes of subparagraph (1), the House shall be considered to be without a quorum due to catastrophic circumstances if, after a motion under clause 5(a) of rule XX has been disposed of and without intervening adjournment, each of the following occurs in the stated sequence:

²¹ *Id.* at 17-19 (*emphasis added*).

“(A) A call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 72 hours (excluding time the House is in recess) without producing a quorum.

“(B) The Speaker--

“(i) with the Majority Leader and the Minority Leader, receives from the Sergeant-at-Arms (or his designee) a catastrophic quorum failure report, as described in subparagraph (4);

“(ii) consults with the Majority Leader and the Minority Leader on the content of that report; and

“(iii) announces the content of that report to the House.

“(C) A further call of the House (or a series of calls of the House) is closed after aggregating a period in excess of 24 hours (excluding time the House is in recess) without producing a quorum.

“(4)(A) For purposes of subparagraph (3), a catastrophic quorum failure report is a report advising that the inability of the House to establish a quorum is attributable to catastrophic circumstances involving natural disaster, attack, contagion, or similar calamity rendering Representatives incapable of attending the proceedings of the House.

“(B) Such report shall specify the following:

“(i) The number of vacancies in the House and the names of former Representatives whose seats are vacant.

“(ii) The names of Representatives considered incapacitated.

“(iii) The names of Representatives not incapacitated but otherwise incapable of attending the proceedings of the House.

“(iv) The names of Representatives unaccounted for. -

“(C) Such report shall be prepared on the basis of the most authoritative information available after consultation with the Attending Physician to the Congress and the Clerk (or their respective designees) and pertinent public health and law enforcement officials.

“(D) Such report shall be updated every legislative day for the duration of any proceedings under or in reliance on this paragraph. The Speaker shall make such updates available to the House.

“(5) An announcement by the Speaker under subparagraph (3)(B)(iii) shall not be subject to appeal.

“(6) Subparagraph (1) does not apply to a proposal to create a vacancy in the representation from any State in respect of a Representative not incapacitated but otherwise incapable of attending the proceedings of the House.

“(7) For purposes of this paragraph:

“(A) The term ‘provisional number of the House’ means the number of Representatives upon which a quorum will be computed in the House until Representatives sufficient in number to constitute a quorum among the whole number of the House appear in the House.

“(B) The term ‘whole number of the House’ means the number of Representatives chosen, sworn, and living whose membership in the House has not been terminated by resignation or by the action of the House.”.

Legislative History of the Provisional Quorum Rule

The consideration and adoption of the Provisional Quorum rule followed the regular order, including a point of order raised on its constitutionality, which was resolved with the counsel of the House Parliamentarian through the question of consideration. As the Speaker stated to the House:

The gentleman from Washington makes a point of order that the resolution adopting the rules of the House for the 109th Congress is not in order because it contains a provision that the House does not have the constitutional authority to propose. As recorded in section 628 of the House Rules and Manual, citing numerous precedents including volume 2 of Hinds’ Precedents at sections

1318-1320, the **Chair does not determine the constitutionality of a proposition or judge the constitutional competency of the House to take a proposed action**, nor does the Chair submit such a question to the House as a question of order. **Rather, it is for the House to determine such a question by its disposition of the proposition, such as by voting on the question of consideration. . . . As such, the House may decide the issues raised by the gentleman by way of the question of consideration of the resolution or the question of adopting the resolution.** The point of order is not cognizable.²²

The House found the Provisional Quorum constitutional when it agreed to the Question of Consideration of H.Res 5 by a vote of 224-192.²³ Subsequently, the resolution was considered, and previous question was agreed to by a vote of 222-195.²⁴

Representative Slaughter (D-NY) moved to commit H.Res. 5 to a select committee composed of the Majority Leader and the Minority Leader. This motion failed on a vote of 196-219.²⁵ Finally, the House adopted H.Res 5 (with the Provisional Quorum rule) by a vote of 220-195.²⁶

Conclusion

Although it has been 17 years since the enactment of the Continuity in Representation Act and the Provisional Quorum rule codified in clause 5(c) of House Rule XX, these two Continuity of Congress measures have ensured that the People's House can function in the aftermath of a terrorist attack, natural catastrophe, or other disaster that might otherwise threaten the world's greatest democracy. Along with other rules and precedents adopted by the House, such as the Speaker's ability to declare an emergency and to assemble the House in an alternate location, the Continuity of Congress is assured by the actions taken by the elected Representatives themselves.

The U.S. House of Representatives, unlike the U.S. Senate, the Presidency, and the federal courts, is the only part of government that has always been elected, never appointed. James Madison, known as the *Father of the Constitution*,²⁷ "explicitly rejected" the idea of the appointment of Members. He viewed appointments to the House as incompatible with the American Republic.²⁸ In *The Federalist* No. 57, **Madison did not envision appointments to the House of the politically connected.** Rather, he talks about electors of Members being rich and poor, learned and ignorant, and distinguished and humble.

²² *Congressional Record of the 109th Congress*, page H10-11, <https://www.congress.gov/congressional-record/2005/01/04/house-section/article/H7-5> (emphasis added).

²³ Roll no. 3, 109th Congress, <https://clerk.house.gov/Votes/20053>.

²⁴ Roll no. 4, 109th Congress, <https://clerk.house.gov/Votes/20054>.

²⁵ Roll no. 5, 109th Congress, <https://clerk.house.gov/Votes/20055>.

²⁶ Roll no. 6, 109th Congress, <https://clerk.house.gov/Votes/20056>.

²⁷ <https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/#:~:text=James%20Madison%2C%20America's%20fourth%20President,%E2%80%9CFather%20of%20the%20Constitution.%E2%80%9D>.

²⁸ H.R. REP. NO. 108-404, pt. 2, at 4.

Madison underscored the point that the House's legitimacy and power are derived only through elections in *The Federalist* No. 39, "The House of Representatives . . . is elected immediately by the great body of the people . . . The House of Representatives will derive its powers from the people of America." Madison also notes in *The Federalist* No. 52, "requisite dependence of the House of Representatives on their constituents."

Proposals for appointments of Members of the House of Representatives have existed for a very long time. From the Constitutional Convention of 1787 to present day, those proposals have always been rejected. The author believes this is not accidental; rather, it shows the continuing wisdom of those in power since the founding of our great nation to not change the foundations of our system. Appointments, for any reason or rationale, would **fundamentally** alter the balance of power enshrined in the Constitution. The strength of the Provisional Quorum rule and the *Continuity in Representation Act* are that they maintain the ability to govern by elected Representatives. If the House decided someday that citizens should serve in a temporary role for the continuity of Congress to deal with the mass incapacitation, those citizens also should be elected by the people.

The author wishes to thank the Chair, the Vice Chair, and the Members of the Select Committee on the Modernization of Congress for the opportunity to testify on these foundational matters to the democracy of the United States.

The author also wishes to gratefully acknowledge the assistance in preparing for this hearing from former Chairman of the Committee on Rules, David Dreier, former Chairman of the Committee on the Judiciary, F. James Sensenbrenner, former Floor Assistant to the Republican Leader William Pitts, former Staff Director of the Judiciary Committee Phillip Kiko, and former Chief Counsel for the Constitution Subcommittee of the Committee on the Judiciary, Paul Taylor. Finally, the author wishes to thank the dedicated and outstanding servants of the House in the Office of the Parliamentarian who have taught him so much over the years about the House, its precedents, and its rules.

Curriculum Vitae for George Robb Rogers

Professional Experience

- Managing Partner, Republic Consulting, LLC, 2019-present
- CEO, Wexler | Walker, 2016-2018
- Sherpa/Cabinet Affairs, Presidential Transition Team, 2016
- President, Wexler | Walker, 2015-2016
- Executive Vice President, Wexler & Walker Public Policy Associates, 2013-2015
- Official Proceedings Script Team Leader & Continuity Advisor, Republican National Conventions, 2004, 2008, 2012, 2016
- Assistant to the Speaker, Speaker of the House John Boehner, 2011-2012
- Policy Advisor & Counsel, House Minority Leader John Boehner, 2006-2010
- General Counsel, Committee on Rules, U.S. House of Representatives, 2003-2006
- Counsel, Technology Policy Subcommittee, Oversight & Government Reform Committee, 2001-2003
- Legislative Counsel, U.S. Senator Richard Lugar, 1999-2001
- Deputy Majority Counsel, Indiana State Senate, 1998-1999
- Deputy Prosecutor for Sex Crimes & Domestic Violence, Grant County, Indiana, 1997
- Partner, Rogers & Rogers, PC, 1996-1997
- Associate, Kiley, Kiley, Harker, Rogers, & Certain LLP, 1994-1996

Education:

- Indiana University School of Law, J.D. 1994
- Miami University, Ohio, B.A. 1990

The CHAIRMAN. Thank you, Mr. Rogers.

I saw Mr. Lewis on the screen, but I don't see him now. I don't know if he just has his camera off. Oh, I saw—ooh, there we go. Terrific.

So I will now introduce our next witness, Doug Lewis, who is joining us virtually from Texas. Mr. Lewis is the former executive director of the National Association of Elected Officials, a national nonpartisan, nonprofit organization that represents the Nation's voter registration and elections officials and administrators at the city, township, county, and State levels.

Mr. Lewis, thanks for being with us. You are now recognized for 5 minutes.

STATEMENT OF DOUG LEWIS

Mr. LEWIS. Thank you, sir.

I want to first say that I am impressed with what you all are doing in terms of looking at these issues. You have done considerable work so far, and it looks to me like you are headed in the right direction of trying to find out what to do. I am very appreciative of the work you are doing.

At the same time, I want to say to you that we looked at it from a standpoint of an election, how do we conduct an election in an emergency situation, what can we do to speed the process and to have the process have validity.

And the first question that we have to ask in any of that is, what do we consider an election to be? If it is just an event, if all it is is that we are going to decide that there is a date certain we are going to have an event, and that event is a bunch of people show up and they vote on a piece of paper, and we get—we get some results from that.

Or is it a process in the sense that we have come to expect in elections throughout the Nation's history that we will have a time to get to know the candidates, and we have a process by which candidates can get on the ballot, and that we then have a time in which we let a primary process work and determine who is going to win that primary? And from that, then we have a general election, and we learn something about the candidates and their positions and what have you.

And so if we are talking about a democracy process, if we are talking about an election as a process that makes this happen all over, then we are talking about something that is a whole lot slower than just doing an event.

And so the questions that have to come, whether we do a 49-day dive—deadline or longer or shorter, the question really comes, do we have enough time for a primary process to work and for all the things that go on before a primary, including filing deadlines and whatever? Do we have—do we allow political parties to choose their candidates ahead of time so that we can then run an accelerated election? What about independent candidates at that point, and how would they choose their nominees? Are we prepared for a situation like in California when they ran that special governor recall? Are we prepared for 50 or 100 candidates to file for the office that is now open due to an emergency?

There has to be some process in here that allows us time to do ballot preparation, to do notification, to do all the things that we have come to expect from what we expect an election to be. In the most extreme instance of this, with nothing going wrong, we can accomplish most of that within 7 to 10 days.

There also has to be time for voters to find out who is officially on the ballot and where they go to vote on that ballot when that time comes.

We have some emergency concerns and considerations. Is transportation available? Do we have electricity? Are there ways for us to distribute ballots and set up polling places and have people come in, or are we going to be forced to only hold it in the daylight hour? If we don't have electricity, how do we create ballots for you?

Now, certainly we can run one without electricity. We can run one without even, maybe, gasoline. If we don't have electricity, we probably can't have gasoline. And so we can do that, but it means it is going to be entirely different than we have ever done before, at least in recent decades. And so the concept of how we do this and the question of whether or not we can do this depends upon the circumstances that are in front of us when we do this.

And so staffing an election is going to be difficult in a national emergency situation. Now, we have learned from experience that if we are running—if we are running those specialized elections for vacancies that occur as a special election, we can run that pretty much with our staff and with the key volunteers that we have always relied upon. And so we can—we can make that work, but it means we also then probably are going to shrink enormously the numbers of polling places that we have gotten used to. We are going to have to look at a way that we can make all of that work for the voters and have locations that they can find, and then probably pay not a bit of attention to the traditional lines to do that. And so it is a complex situation.

I want you to know that elections officials will do what they have to do to make this come off, but we really have to have you all decide what is the larger context of what is an election and how do we get there.

Testimony of Doug Lewis, CERA

4-6-2022

Thank you Mr. Chairman, Mr. Vice Chairman, and Members of the Committee for providing an opportunity for the nation's elections administrators to participate in this hearing. . Even though I am retired, I still value local and state election administrator's professional concerns about election laws.

It is sobering indeed to have to contemplate a situation that would require the use of any special provisions, whether natural disasters or human caused disasters. .

I was asked for input on whether national elections to replace Congressional Representatives could be held within 49 days as currently provided in law and what implications this timeline might have for conduct of elections.

First, elections administrators don't want to complicate the process in any time of national emergency. Election professionals get the message that this would be a "dire emergency" and that unusual occurrences or events would create the need for immediate response.

To respond, however, in a manner that gives you a full range of things to consider before passing any legislation related to reacting to national disasters and/or provide for methods of Congressional successors to be put in place as quickly as possible, it is incumbent upon us to raise issues that can be too easily glossed over.

The underlying assumption for ordering a quick election would be to assure that the nation's business is attended to by the people's elected representatives.

What Is An Election?

The first question to consider: What is an election? Is it a date-certain event so that voters can vote, or is it more than that? Is an election in American democracy really a "process" that includes time for the identification of candidates, the ability of the candidates to mount a campaign, to raise funds, to attract supporters, to inform the voters of their choice and then going to the polls to make that choice?

The point is this: if it is only an event, then we can structure an event in a short time-frame and carry off the event as flawlessly as possible. If, however, you define it as a broader "process", then you have to allow the process time to work.

We also need to consider whether a "general or special election" includes a primary election. How are primary elections handled within a 49-day timeline?

- Do we just abrogate the primary selection and jump to the general or special election?
- Do we allow political parties to get together to choose nominees and eliminate the process that most states use in allowing the primary voters of those parties to select candidates?

- What about the opportunities for independent candidates and minor party candidates? Or do we do like California did in recent years and just have a minimum number of low threshold requirements and allow all who can meet the low threshold apply for a ballot position?
- Are we prepared for 50 or 100 candidates or more for each of these openings?

Currently, under “special election” situations, we allow for a period of time for the primary process to work but in a limited fashion. The difference in the situation here is that we are filling usually one or two Representative slots at any given time and that the election, while important, does not have the same sense of importance that a *national election* to fill numerous vacancies would presumably have in a case of national emergency.

When election officials considered this concept of an emergency election process after 9/11, we polled selected election officials from around the country to get a representative sample of what elections administrators would want to conduct an election with integrity, with fairness to the voters and the candidates, and which would result in serving the interests of democracy – all within a heightened environment of a national emergency.

While the responses indicated a variety of dates ranging from the shortest time period of 35 days (after determination of who the candidates will be) to a period of four months, it appears that elections administrators felt that they could conduct an election within as few as 45 days, if the primary election or selection of candidates is done prior to that election period. However, the election officials would be far more confident that the interests of democracy would be best served by having 60 days or more to organize and hold elections. Each additional day beyond the 45-day minimum time frame creates greater confidence in the process.

Doing both a primary election and a general election in a 49-day time frame changes enormously the concept of elections as we know them.

Number of Days Necessary

Why do we need that much time especially in face of a national emergency? There has to be some process for the filing and qualification of candidates and most election officials believe that a bare *minimum* of 7 days is the shortest period, but that 10 days is necessary. There then has to be a period of ballot preparation, either printing paper ballots or programming electronic voting devices. In today’s technology world those are both specialized functions and cannot be purchased or produced at every local printer or with local technology specialists in the vast majority of cases. In the most extreme instance of nothing going wrong anywhere, we can accomplish most of this within seven to 10 days but longer may be necessary .

There also has to be time for voters to find out who is officially on the ballot and to discover information about them. Do we just trust that the news media can do this job for us? What if the entire nation’s electricity is crippled or even significant portions of it? Will the law allow some flexibility for instances of when best laid plans hadn’t anticipated the kind of disasters confronting us?

Many who are looking at this issue do not want to break with the tradition of having House members being elected rather than being appointed -- even for a short duration. We have no quarrel with that viewpoint.

At the same time, it seems to us that the tradition of our form of democracy must weigh in equally – and our tradition allows us the time to get to know our candidates, the issues, the choices and the selection by voters of their choices.

The genius of American democracy is that it creates fundamental faith in voters that elections are fair, free, have great integrity and engender voter confidence. But sometimes the process is terribly inefficient and cumbersome and time consuming and maddeningly frustrating in its complexities, and yet it works. Accomplishing an election within 49 days means that we would have to suspend many state laws and procedures just to accomplish the task and suspend many of the voter protections that are contained in the current system.

Vacancies Mandated at Federal Level vs. State Concerns

Additionally, Congress has determined that the emergency election would be triggered whenever 100 or more vacancies of members of the House occur. Some discussion likely needs to be held as to whether an emergency election needs to be held at lower thresholds in some instances. For example, if a disaster wipes out the majority of the Congressional representatives from one or more states, then are those states allowed to trigger an emergency election under federal law or do they have to simply wait until the next regularly scheduled election? Or for the state to declare one or more special elections? This can have consequences: If an extraordinary number of California representatives, or Texas representatives or Florida or New York representatives are incapable of serving, then it may change the direction of Congress itself.

Even without concern for individual states and their Congressional makeup, an event that triggers 100 vacancies in the US House likely means that something of epic proportions occurred. A lesson learned in New York when 9/11 happened (because an election was also set in NY for that day) is that you need a few days just to assess what kind of disaster happened and what resources are even available. Here are some of the concerns:

- Is transportation available so we can have election workers (both fulltime and those traditionally called poll workers)?
- Can we get cars to run, are streets clear so we can distribute ballots and return ballots from traditional polling places, and are buildings available for the conduct of elections?
- Is there electricity available? If not, how do we create and distribute ballots and then how do we count them? In small states we can count ballots by hand but counting in New York City or Los Angeles or Houston or Chicago or any high volume location will take enormous amounts of time without voting machines. (And the voting machines are far more accurate than humans in high volume ballots.)
- Is there ballot stock available on short notice and in sufficient quantities to be able to print official ballots? In normal elections, we use ballot stock that is ordered from vendors months before use and then we tightly control the distribution of the stock to be able to prevent ballot substitutions. (We number the stock of ballots and account for how many were printed, how many spoiled, how many voted, how many remain in inventory).

- If we can't do these normal procedures, how do we organize substitute practices and procedures and conduct an election that engenders the faith of the electorate and of the candidates? We can vote on plain paper (but it's much harder to control those who would try to manipulate outcomes) and we can have voters hand write their choices but we are then saying we are likely to have only a handful of voting locations that can be open during daylight areas. In those instances, there will be long lines and much delay in voting.

I don't have a preconceived notion here about what are the right policy answers, only an administrative viewpoint that you need to consider these questions before deciding the general election question. And the states, which have traditionally set the processes and qualifications for these choices, have a variety of answers and solutions here.

Presumably, the Congress is going to say that a national emergency needs to take precedence and that national interests are superior to states' interests...and that may even be the correct viewpoint, but deciding that issue alone is not without its impact on "tradition". **Federal law here will definitely have to vacate all of the state laws concerning these practices in order to stay on the federal timetable.** And the states and locales will have to create new policies and procedures that will apply to this election only.

Emergency Election Needs and Concerns

Voter Registration, Absentee and Military and Overseas Ballots

Voter registration needs new considerations. What is the period to be allowed for registration cutoff in this kind of election, and when do elections offices need to have the voter registration documents to voters in a shortened time frame? On-line voter registration, in the states that have that currently have that in place, can speed the process (as long as there is so ability to verify the eligibility of the individual to be a voter). If however, the emergency status restricts or eliminates the use of on-line (lack of electricity or lack of internet service or most computers are corrupted by malware) then we are back to a paper based process.

There is also the process of preparing Absentee Ballots for the disabled, permanent absentee voters (depending on state laws), and military and overseas voters. We need "transit" time for those voters to be mailed a ballot, delivery of the ballot to them, a reasonable amount of time to complete the ballot, and then to return the ballot. Or, we can override any state law that does not allow for electronic delivery of both the transmission of the blank ballot AND the return of the voted ballot. (This presumes that electricity is available.)

We can receive and count some of these ballots even after Election Day, so we can pick up some days within the election countdown of 49 to 60 (or more) days, but not all of that time. And this assumes that the Postal Service can function in traditional ways; it is likely in a major disaster that mail ballots are simply not an option.

If we had more time on the front end of the process to allow us to get those ballots to the voters we could then require all of them to be in by Election Day so that the results are known shortly after Election Day.

Staffing Elections

We can normally staff a special election quickly with office staff and key volunteers and key election week workers because it is a manageable size; in this instance we are likely to be overwhelmed with an election the size of a normal general election but now with only a limited number of days to do what it takes us months to do in preparation for a general election.

Perhaps Congress can give election officials the ability to commandeer the services of county and city employees to serve as poll workers and election workers during a national emergency and waive any labor laws contradicting such uses.

Congress could also simplify the process by declaring federal elections take precedence in such an emergency and that only federal elections will be conducted. At that point, a major election in the face of a disaster becomes limited and improves our ability to structure a voting methodology that can respond quickly with an ability to determine outcomes quickly. State and local government elections need to be conducted separate from the federal elections during an emergency.

While there may be only a handful of candidates on the ballot in most jurisdictions, within our urban centers there will be multiple Congressional candidates races. And the preparation is the same regardless of how many offices are on the ballots. We still have to find the appropriate number of polling sites (many of which will NOT be available to us in this kind of election), staff them with poll workers, machines, ballots, and information – all of which takes months normally. The simple act of ordering ballot paper involves ordering months in advance for jurisdictions and is purchased in some by the boxcar load. Notifying voters of their polling sites all by itself can take a considerable amount of time especially because the usual facilities may not be available to us.

Training Required

Election official and precinct worker training can only come after there's been enough time to recruit enough people to serve (and enough reserves when traditionally 10 percent and higher do not show up). Why additional training? Because a 49-day schedule election would have to overrule so many procedures and processes that we use in a normal election, that we would have to retrain all to the "emergency elections" procedures.

All Mail Election – Vote By Mail

It may be possible to do an all-mail ballot election in such an emergency. But this presumes that there is electricity, that gasoline is readily available, that transportation nationwide is possible and that the Postal Service has employees who can do this on short notice. It also likely has political impact and both parties need to agree to the methodology for it to have validity with their voters.

- Most American jurisdictions don't have enough experience with massive vote by mail programs such as Oregon and Washington have. It would, however, allow us to eliminate the time spent on polling place sites (and making sure they are accessible) and poll workers. But it also means that high numbers of workers are needed to prepare ballots for mail on the front end and also high numbers needed to process return ballots especially if there is no ability to use technology to process or count those ballots.

- In checking with the election officials after 9/11 in Oregon (an all mail ballot state) and Washington State, they told us then (2003 time frame) they would need a minimum of 54 days in order to conduct an emergency election by mail. Clearly, many parts of the nation implemented a Vote By Mail (VBM) option (or other in-person options) due to the Covid crisis and did so fairly quickly. It was not without great risk since they had little experience in preparing for those options in addition to their other duties ... or even if VBM became their only option. My guess is that some of that the time needed could be shortened if we are only discussing federal elections.
- VBM was not without political consequences. Some questioned the integrity of the election due to its use and implementation without concurrence of both parties that it was necessary and acceptable.

Election Administrators Responding to Emergency Needs

It's important to note that I believe a Can-Do attitude of election officials means that we can and will overcome most of the limitations discussed above.

But to offer an ambitious 49-day schedule that encompasses both a primary and a general election is dramatically changing what the public, and the interest groups and the political parties have come to expect as an "election process". Can we do an election in 49 days? Yes, but it would not be what America has grown to know and understand as an election. Such an election would suspend the rights of many participants and voters.

Essentially, we are compressing a normal election into a tight window. We normally want to lock down an election at the 180-day stage in most parts of the nation and indicate there are to be no more changes past that date to allow us to have the ability to notify voters and candidates and to register them and to have a primary and then a general election.

My best advice is to give election officials a minimum of 49 days to conduct the general election and add additional days to determine the candidates to be on the ballot in the general election. Congress may want to consider a process that lets the political parties name their chosen candidates and then have them compete for election; or Congress may want to conduct both a primary and a general election. Closer to **60 days or more** increases the likelihood that the election will mean more to the candidates and the voters. It will allow election officials to build in the kinds of quality assurance, integrity, and voter confidence processes that have been the hallmark of elections in America.

Should 75 Days Be The Emergency Election Period?

Current law specifies in **Section (b) (2) Timing of Special Election** that the election doesn't have to be within 49 days if it is within a 75-day period of a regularly scheduled election. If this exception can be made that close to a regular election, then shouldn't 75 days be allowed for ANY emergency election? At that level, it is possible to do an election that encompasses the traditional understanding of election process rather than an election "event".

What Effect Will Courts Have on An Emergency Election?

What will courts do within this environment? As policy makers, you may have to consider what kind of legal challenges will be recognized in a time of national emergency and what latitude judges will have in delaying or ordering additional candidates on ballots, or the many other examples election officials can give you as to how courts can obviate the best intentions of elections planners.

- The last clause of the current law (**Section 7 Rule of Construction Regarding Federal Election Laws**) indicates that nothing in the current law is meant to override the provisions of law contained in six (6) additional federal voting laws. The very inclusion of Section 7 then complicates the ability of the courts to meet the guidelines specified in Section 301, (4) (b). There are so many areas of possible conflicts contained in those laws that judicial review could be weeks or months in deciding.
- Does judicial review make clear what courts have jurisdiction? (**Section 4 B Judicial Review**). Can actions begin first in state courts contesting state laws affecting conduct of the election? If federal law is to prevail in a declared emergency, then shouldn't the only option be to move ANY court action affecting federal offices to the federal courts? Additionally, the current law says actions are filed in a US District Court but with a 3 judge panel. Is it possible to empanel a multi-judge hearing quickly and can that be accomplished within the current statute?

Great Unknowns

- Here is one consideration that no one involved in elections ever wants to consider: will voters show up in this special election? If the disaster is a major magnitude, will they be so overwhelmed just trying to survive that they have little interest ... or ability ... to participate?
- There are also cost considerations, which I haven't discussed in the hopes that a true national emergency means that costs at each level are ignored, but this may or may not be a valid assumption.

Faith in Government

Elections administrators in America are used to doing the impossible and doing so with less money and resources than they should. They will perform well in any national emergency. All we ask is that Congress not structure emergency elections in such a way to place the process in an overly risky, overly ambitious timetable which courts additional disaster. Remember clearly that **for the public to have faith in the government, they first must have faith in the process that elected the government.**

Election Day is Not The End of the Process

One last note of caution: When Election Day is over, there will still not be any seated members of Congress. It takes a period of days after the election to do the "vote canvass," whereby election officials roll in the absentee votes and those coming in from military and overseas voters. We will still have to qualify all of the provisional ballots that are cast in such an election. In most states we can accomplish that in 5 to 10 days, but in some cases even 15 days is going to be an extreme limitation due the high numbers they have to resolve.

California, for instance, needs and uses all 28 days allowed to qualify provisional voting. That is not 28 days where Congress can wave a “magic wand” and say to California “you don’t need all that time.” If it takes that much time, do we just not count those votes?

You need to take into consideration that whatever number you set for the election process leading to Election Day, election officials still will have some back-end processes that are necessary and vital to a valid election. And one of the large considerations is the question: do you eliminate provisional voting in such an emergency? Or eliminate all absentee votes that cannot or do not arrive prior to Election Day? Can we just suspend the voting rights of the disabled, the absentee, the military, the overseas and the provisional voters?

There are probably easier solutions than elections but any process which looks at appointing or selecting replacements also needs to consider the public’s willingness to accept the succession plan. As long as other governmental bodies are involved in the succession plan and elected governmental representatives are providing successors, then perhaps it will be accepted. But if there is a choice of appointment rather than general public election, it may be wise to consider letting state legislators elect members from their chambers to replace lost officials so that experienced legislators can serve in the interim and will not lose time learning the legislative process while trying to react to the national emergency.

Doug Lewis, CERA (Certified Election Registration Administrator) is retired since 2015

He was the Executive Director of The Election Center a national nonpartisan nonprofit that specializes in election administration from 1994 to 2015.

- The Election Center is a 501c3 organization that is dedicated to improving the professional competence in election and voter registration administration. It serves as the voice of local and state election administrators throughout the nation. It fostered the Code of Ethics for the profession and it is the certifying body for professional certification resulting in the designation of Certified Election Registration Administration (CERA), the highest achievement within the profession.

He was also concurrently Executive Director of the National Association of State Election Directors (NASED) 2005-2015.

- Prior to taking on the role of Executive Director for NASED, he ran the voting systems certification process for NASED (which became the foundation for the EAC's certification and testing processes currently) from 1994 to when the EAC took over the program.

During the aftermath of Election 2000, Doug appeared on CNN, ABC, CBS, NBC (including Today Show) and was a regular on C-SPAN, representing the nation's elections administrators.

He was asked to help Congress and state legislatures fashion solutions to the election crisis. He represented election officials in the development of the Help America Vote Act and in revisions to other federal laws affecting elections. His work was praised by elected representatives of both political parties. He was able to work with both parties in the House and the Senate as a trusted resource for election practices, policies and procedures.

Washington Post and national columnist David Broder referred to him as "the man who knows more about the conduct of elections than anyone else in the country: the director of the Houston-based Election Center, Doug Lewis." May 13, 2007.

He is a member of the National Elections Hall of Fame and received the Distinguished Service Award from the National Association of State Election Directors.

He served as the first chairman of the Board of Advisors of the U.S. Election Assistance Commission and served on that body for more than 10 years.

The CHAIRMAN. Thank you, Mr. Lewis.

Our next two witnesses are the co-chairs of the AEI Continuity of Government Commission. I am going to introduce them both and allow them to present their testimony together.

Donna Shalala is the University of Miami Board of Trustees presidential chair and professor emerita in the university's Department of Health Management and Policy. From 2019 to 2021, she served as a Member of the U.S. House of Representatives, representing Florida's 27th District. Previously, Congresswoman Shalala served as the president of the Clinton Foundation and the University of Miami and as the 18th United States Secretary of Health and Human Services throughout the Clinton administration.

A.B. Culvahouse most recently served as the United States Ambassador to Australia, from 2019 to January 2021. He previously served as the chair of the international law firm, O'Melveny & Myers, LLP—did I get it? Close enough for jazz—and as White House Counsel during the last 2 years of the Reagan administration.

Both President Donald Trump and the late Senator John McCain tapped Ambassador Culvahouse to vet their Vice Presidential candidates.

I don't know if I call you Congresswoman, Secretary, President Shalala, Donna, and Ambassador Culvahouse, you are both recognized for 5 minutes, 10 minutes combined. Take it away.

STATEMENTS OF THE HONORABLE ARTHUR B. CULVAHOUSE, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; AND THE HONORABLE DONNA SHALALA, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; THE HONORABLE BRIAN BAIRD, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION; AND THE HONORABLE MIKE BISHOP, ON BEHALF OF CONTINUITY OF GOVERNMENT COMMISSION

STATEMENT OF THE HONORABLE ARTHUR B. CULVAHOUSE

Mr. CULVAHOUSE. Mr. Chairman, Ranking Member Timmons, members of the committee, thank you for having us today. I will summarize my prepared statement. I am joined with—we are joined with two other members of our commission, Brian Baird, and I think Mike Bishop is online, who are former members of this body.

I will quickly identify what the problem—or the principal problem, as we see it, and I think Secretary Shalala will talk about our recommended solutions.

Mr. Chairman, members of the committee, I first visited the issue of continuity of government in 1987 as the brand-new White House counsel and received a very sobering briefing on what helicopter I was supposed to be on in the event of the proverbial bolt out of the blue.

Since then, I have served on two different Nuclear Command and Control Department of the Defense Advisory Commissions, doing a deep dive, again, of the survivability of the executive branch gov-

ernance and of our Nuclear Command and Control System in the event of catastrophic attack.

As stated in my prepared statement, we have extensive and elaborate procedures, laws, and constitutional provisions to assure that we always have a President. Now, that President may not be the elected President or even the elected Vice President. But our enemies, foreign and domestic, can be assured that we will always have a President to exercise those responsibilities.

Our commission and the commission before us, and many other experts have concluded that the same is not true of Congress, that under certain cataclysmic, catastrophic scenarios, you could resolve in not having a functioning House of Representatives. That by definition is a fault line and a fissure that requires attention.

The Constitution is clear in Article I, Section 5 that a majority of each House shall constitute a quorum, if not a majority of Members then living. And in the case of the House of Representatives, as you know better than I, vacancies can only be filled by special election, the result being that it is abundantly clear in our mind—and we have spent a lot of time studying this—if more than 218 Members die or are incapacitated in a mass attack, the House could not convene, could not make laws, could not pass appropriations, could not override a veto, could not impeach a rogue President, which—and could not confirm a Vice President or otherwise check and balance the executives in a situation of great peril. And that is the problem that we respectfully suggest most requires the attention of this committee.

My prepared statement identifies three other issues of, I guess, lesser gravity, we would say, one of which is that it would be helpful and beneficial and wise for the authority of the House in clear situations to meet virtually and remotely. I don't—we are not purporting to get involved in the debate of the day, but we can probably all envision of scenarios where meeting remotely or virtually and voting remotely would be wise.

Third, the third issue relates to the requirement on January 3 that Congress assemble, elect a Speaker, adopt rules, and then on Presidential election years, on January 6, elect to count electoral ballots. There are no provisions for alternative ways to accomplish those important tasks in the event of catastrophic events and people cannot assemble as required.

And then fourth, the Constitution does not provide for replacement of severely incapacitated House or Senate Members, and you can see, again, in a catastrophic scenario where you would have living Members but who could not assemble and—for quorum purposes. And, again, you would have the potential for a House that cannot—does not have a quorum and, therefore, cannot function.

Mr. Chairman, members of the committee, in all four of these scenarios, and most especially the first, relating to the lack of a constitutional quorum by mass casualties, they threaten the continuity of Congress as a functioning representative of the American people, and our commission respectfully suggests that they need to be addressed.



Statement before the House Select Committee on the Modernization of Congress
Full Committee Hearing
On Congressional Continuity: Ensuring the First Branch Is Prepared in Times of Crisis

Ensuring the Continuity of Congress

The Problem

A. B. CULVAHOUSE

Co-Chair, Continuity of Government Commission

April 6, 2022

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Congress is an essential institution in our political system, but we don't have adequate protections against threats that could undermine its very existence during a crisis.

I am a co-chair of the Continuity of Government Commission, a commission that was active after 9/11 and has been reconstituted to consider more recent threats to Congress and other institutions and to develop recommendations to ensure the continuity of key governmental institutions after catastrophic events.

Continuity of government plans and a line of succession are most associated with the presidency. Our laws and constitutional provisions relating to presidential succession may not be perfect, but we do have extensive provisions that attempt to ensure that we always have a president even after catastrophic events.

The same cannot be said for Congress. An attack on Congress that left a majority of members dead would cripple Congress for months. We would either have no Congress at all, or perhaps a small, unrepresentative minority of remaining members might seek to act as Congress with severe constitutional and legitimacy questions swirling around the institution.

The Problem

There are multiple scenarios that would endanger Congress, but one scenario most clearly threatens Congress's very existence. If an attack, pandemic, or other catastrophic event killed more than half of the House of Representatives, our current constitutional framework has no remedy to restore a legitimate, representative House for many months.

The key constitutional provisions that undergird this scenario are (1) the way vacancies are filled in the House of Representatives and (2) the requirement that a majority of each chamber of Congress shall constitute a quorum.

Vacancies in the House are only filled by special election (unlike the Senate), and special elections after members die in office take on average four months to conduct. Suggested plans for elections to be held on a significantly shorter timeframe would require shortcuts that would make these elections less

democratic. Current law requires ballots to be mailed to overseas and military voters 45 days before an election. Some also propose to do away with primaries and have candidates appointed by a party committee, where in many instances the primary election would be much more likely to be competitive than the general election. Dramatically reducing the time to hold a special election is not possible, and even modestly speeding up special elections would come with significant tradeoffs.

The quorum rule is that a “Majority of each [House] shall constitute a quorum to do business” (Art. I, Sec. 5, clause 1). The framers thoroughly debated the quorum requirement and decided on the high standard of a majority of the body. They worried about small groups of members of Congress acting as the true Congress, citing examples of rump parliaments in British history and worries about representatives from states close to the capital attempting to operate Congress without members from the states on the periphery. For them, a small group of members operating as the whole would be profoundly unrepresentative and undemocratic.

An event that killed a majority of the House of Representatives would mean that the House could not achieve a quorum for months. It would mean that a president, possibly a successor president, would act in the gravest of emergencies with no check on executive power or no coordinate branch to help respond to the crisis.

Alternatively, if the House were to attempt to act with a number smaller than 218 members, one could imagine a House where many states were not represented and where the party balance could be dramatically shifted by the attack. Imagine only twenty members survive an attack and seek to pass legislation or impeach a president, or by two thirds override vetoes or expel other members. The most dramatic case would be one where the president and vice president are killed and these 11 remaining members would elect a new speaker of the House who would assume the presidency in the line of succession.

Providing a fix for this scenario of many members of the House of Representative dying in a catastrophe is at the heart of ensuring the continuity of Congress.

We also considered other scenarios where Congress could be fundamentally undermined or prevented from operating.

1. The problem of many deaths short of a majority.

Two of our colleagues on our commission, who were your colleagues in the House of Representatives, Rep. Brian Baird and Rep. Mike Bishop, are with us today on this panel and can speak to one of these challenges.

Rep. Bishop was a member of the Republican congressional baseball team when a gunman attacked their practice, seriously wounding Rep. Steve Scalise and endangering the lives of all of the representatives and staff on the field. But for the heroic actions of police, many lives could have been lost.

This incident illustrates how an attack could target groups of members from one party, perhaps with the intent of changing a congressional majority or destabilizing the body as a whole. Our recommendations to address the problems of mass vacancies would also deter this scenario.

2. Congress cannot meet together in one place.

The Commission also considered situations where Congress might not be able to meet together for extended periods of time. If Congress faced this predicament for many months, this scenario would also effectively deny the country its representation in Congress and Congress's place in the constitutional system at a key time.

3. Mass incapacitations.

Just as the House of Representatives would be constitutionally prevented from acting if more than a majority of the House were killed, so both the House and the Senate could potentially be prevented from acting if many members were incapacitated or if the combination of deaths and incapacitations reached a high level.

4. The start of a new Congress.

There are special problems that could affect the House and Senate if catastrophe struck before the opening of a new Congress. Swearing in new members and commencing a new Congress could be implicated by an attack or a scenario where members could not come to Washington.

Congress is an essential part of our constitutional system. We should not let the actions of our enemies or natural disasters rob us of a functioning Congress in times of crisis. The core problem of mass vacancies in the House of Representatives as well as other related scenarios should be addressed to ensure the continuity of Congress.

STATEMENT OF THE HONORABLE DONNA SHALALA

Ms. SHALALA. Thank you very much. Thank you, Mr. Chairman. Thank you, Mr. Rogers.

Chairman Kilmer, Vice Chairman Timmons, let me address the exact recommendations. First, the problem that Congress cannot meet. The Commission, we actually didn't comment on the actions taken during the recent pandemic, but we noted that there could be some disaster in the future where everyone would agree it is impossible to meet in person for an extended period of time.

To ensure that Congress could function during this crisis, we recommend a constitutional amendment that would give Congress the power by law to provide for the scenario, including the possibility of remote participation. However, this constitutional amendment would provide protections to ensure that remote floor proceedings would require the in-person or virtual presence of at least one-half of each body to meet the quorum requirement, and that Members would be provided notice and be guaranteed access to whatever mode of meeting that is envisioned in law.

We also make a recommendation to address the problem of incapacitated Members. In the extreme case, when the numbers of deceased and incapacitated Members exceed a majority of either Chamber, temporary replacements will replace the incapacitated Member. But any Member deemed incapacitated shall immediately be reinstated if they declare that they are able.

We make a recommendation for the start of Congress. The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power would include provision for each Chamber to remotely swear in new Members and commence the business of a new Congress.

And then we make a recommendation for a change to House rules. We recommend that the repeal of parts of a House rule that currently exists. In 2005, House rule XX, clause 5, was amended to include emergency procedures under which the quorum of the House may be reduced potentially to a very small number if only a few Members of Congress remain alive and are able after a catastrophic attack.

The rule's stated aim was to allow the House to operate under almost any circumstance. We believe that this rule is both unconstitutional and unwise.

Finally, on the method of selecting temporary replacements, we recommended that temporary replacements be drawn from a list provided by each sitting Member. Using this method, the temporary replacements would most resemble the representatives who lost their lives in the catastrophe and would not shift the balance of power in Congress.

That is a summary of our recommendations. We obviously have more. I sat on the original commission, and I think it is important for all of you to consider these recommendations, but more importantly, to consider what happens and how the problem of mass vacancies ought to be managed. And it is a decision that ought to be made quickly, because the possibility is certainly in front of us.

When I was a young assistant secretary at HUD in the Carter administration, I was the designee to manage the Department in case of a catastrophe. And I remember flying in the middle of the

night in a rainstorm to a bunker to manage the Department of HUD. It was actually terrifying, and we weren't very well organized.

These kind of catastrophes, as we now know, are now very much in the future, and in the near future, we simply have to make these decisions.

Thank you very much.



Statement before the House Select Committee on the Modernization of Congress
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Ensuring the Continuity of Congress

Recommendations

DONNA SHALALA

Co-Chair, Continuity of Government Commission

April 6, 2022

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RECOMMENDATIONS TO ADDRESS THREATS TO CONTINUITY OF GOVERNMENT**Recommendation to Address the Core Problem of Mass Vacancies in the House of Representatives**

If more than a majority of members of the House of Representatives were killed in an attack, Congress would not be able to function for several months, or alternatively some might try to operate the House unconstitutionally with a very small and unrepresentative number.

To address this core problem, our commission recommends a constitutional amendment to fill those vacancies immediately with temporary replacement members who would serve only until the time that special elections could be held.

With this provision, vacancies could be filled immediately, and the House of Representatives would be able to act with near full membership. Congress would assume its proper role in the political system during the crisis. States would still proceed in holding special elections to fill the vacancies, and once those special elections were held, the elected members would displace the temporary replacement members.

Some form of this amendment was the substance of three constitutional amendments that passed the Senate in the 1950s and 1960s, and was at the heart of this commission's earlier recommendations after 9/11.

Our commission in its current round of deliberations settled on the solution of providing for temporary replacement for all deaths resulting from death even if the number of deaths does not reach a high level. The reason for our commission's change in approach is the logistical difficulty of setting a threshold. After an attack, it might not be clear how many members had died, or the deaths might occur over an extended period of time. Filling all vacancies that result from death, even in the ordinary course of business, ensures that Congress will fill its vacancies in a mass casualty situation. It also would discourage attempts from outside actors to target groups of members from one political party with an aim of changing a majority or destabilizing the Congress.

Finally, on the method of selecting temporary replacements, the commission recommends that temporary replacements be drawn from a list provided by each sitting member. Using this method, the temporary replacements would most resemble the representatives who lost their lives in the catastrophe.

Recommendation to Address the Problem That Congress Cannot Meet

The Commission does not comment on the actions taken during the recent pandemic. But it notes that there could be some disaster in the future where everyone would agree that it is impossible to meet in person for extended periods of time.

To ensure that Congress could function during this crisis, the Commission recommends a constitutional amendment that would give Congress the power by law to provide for this scenario including the possibility of remote participation. However, this constitutional amendment would provide protections to ensure that remote floor proceedings would require the in-person and/or virtual presence of at least one half of each body (to meet the quorum requirement) and that members be provided notice and be guaranteed access to whatever mode of meeting that is envisioned in law.

Recommendation to Address the Problem of Incapacitated Members

In the extreme case when the numbers of deceased and incapacitated members exceed a majority of either chamber, temporary replacements will replace the incapacitated member. But any member deemed incapacitated shall be immediately reinstated if they self-declare that they are able.

Recommendation for the Start of the Congress

The House and the Senate shall each have the power to provide for the commencement of business at the start of a new Congress, and that power could include provisions for each chamber to remotely swear in new members and commence the business of a new Congress.

Recommendation for a Change to House Rules

The commission recommends the repeal of parts of a House rule. In 2005, House Rule XX, clause 5 was amended to include emergency procedures under which the quorum of the House may be reduced (potentially to a very small number) if only a few members of Congress remain alive and able after a catastrophic attack. The rule's stated aim was to allow the House to operate under almost any circumstance. The commission believes the rule is both unconstitutional and unwise.

Continuity of Government
Oral Testimony of
The Honorable Brian Baird (WA3, 1999-2011)
Delivered before the House Select Committee on Modernization of
Congress
April 6, 2022

Chairman Kilmer and Chairman Timmons, Distinguished Members of the committee,

Thank you for holding this hearing and giving us the opportunity to speak with you today. And thank you for recognizing the existential, importance of this topic. It is not hyperbole to say that if this hearing eventually leads to responsible action to remedy the continuity vulnerabilities that we will discuss, this may one day be recognized as one of the most important hearings in the history of the Congress. The matter is that serious.

As a bit of personal background, I first began to think about continuity of Congress seconds after witnessing the fireball explode at the Pentagon when the passenger jet struck it on the morning of September 11th. That evening, I began to study in detail what the consequences would be if the planned strike on the Capitol or some future attack managed to kill multiple members of Congress.

As I came to recognize, and as eventually outlined in the three volume reports of the first Continuity of Government Commission and now in the current 2022 Commission report, we were then, and we still are, woefully and dangerously unprepared for events that are quite easily imagined and, in fact, have actually taken place.

I fully understand that none of us wants to fully accept the reality of our own mortality from natural causes or accidents. And I also understand that we all wish we did not live in a world and time in which international actors or people within our own country might wish to kill or incapacitate

members of our government, including ourselves as members of Congress. But unpleasant as that is, multiple events in recent years demonstrate that it is reality and the risks are particularly acute today. We have been remarkably fortunate that as horrible as the events of Sept 11th, the anthrax attacks, two attempted assassinations of our colleagues, the ongoing COVID pandemic, and the attacks of January 6th were, they all could have been much worse.

Fortunately, the matter has been studied exhaustively for more than twenty years now, so the question is not really does something need to be done or really even what is it that needs to be done. We have good answers for both of those questions, as will be discussed today.

The more difficult question now is, “Will Congress have the will power, leadership, and wisdom to act.” The answer to that question is up to this committee and your colleagues.

As part of my testimony today I have included extensive written remarks. I offer that material as an addition to the full Commission Report, which I enthusiastically endorse.

While fully endorsing the Commission report, I do want to emphasize a few additional observations and suggestions for the Committee’s consideration.

In the aftermath of the 2001 terror attacks, our initial continuity of Congress focus was on ensuring that the House and Senate could be restored to functioning as rapidly as possible. That continues to be our emphasis today, but it is also important to consider two other elements – continuity of representation, and the legitimacy of the Congress.

For Congress to be a fully legitimate body, as intended and designed by the founders, we must ensure in our continuity measures that the fundamental principle of representative government is maintained for all states and people in the nation. That was the goal of the founders to begin with and it is just as essential today.

It is equally important that continuity provisions do not enable events, be they natural or the result of hostile actions, to substantially alter the political makeup of the institution as determined by the voters. Any mechanism that could allow something called a Congress to exist, but that might deprive significant numbers of our people or states representation in that Congress, or that could reward acts of violence that alter the political makeup of the institution, should not be sustained or enacted.

The recommendations we offer today meet both tests by ensuring nearly immediate replacement of deceased members of the House with temporary successors chosen by the incumbent to fill the responsibilities until elections can be held. That approach, better than all others we have considered, will assure not only that there is “a Congress” but that “the Congress” is truly a representative body and its political/ideological makeup cannot be arbitrarily or intentionally altered without elections.

Which brings me to the final point I will make in these remarks but I address in much greater detail in my written testimony. While the focus of the Commission Report is primarily on House continuity, I believe strongly that essentially the same mechanism recommended for the House should also apply to the Senate, for the same reasons just articulated. The good news is that the 17th Amendment already contains language allowing state legislatures to implement for replacement of U.S. Senators the very mechanism of member designated replacements that the Commission has recommended be implemented for continuity in the House.

Speaking personally, and not on behalf of the Commission, I believe state legislatures across the nation should follow this example as quickly as possible and enact appropriate measures to provide for temporary member designated replacements in the event an incumbent U.S. Senator dies in office.

One final note. By encouraging you and the rest of your colleagues in Congress and in state legislatures to support these changes, we are not only seeking to secure the continuity of the Congress itself. We are also trying to help protect your lives by reducing any incentive for adversaries to engage in violence as a way to alter our political system or composition.

With that I will conclude my prepared oral remarks but would invite the committee to also consider my accompanying written testimony for more detailed analysis of these and related issues.

Again, thank you for your leadership on this vital issue. I'm glad to address any questions you may have.

Submitted by

The Honorable Brian Baird

Member of Congress 1999-2011, 3rd District Washington

Continuity of Government
 Extended Written Testimony of
 The Honorable Brian Baird (WA3, 1999-2011)
 Delivered before the House Select Committee on Modernization of Congress
 April 6, 2022

The Succinct Problem Statement of Congressional Continuity

It is easy to be overwhelmed, both emotionally and cognitively, by the seriousness of the life and death issues that are inherent in continuity of Congress discussions and by the complexity of the constitutional, statutory, procedural, and other technical details that are involved.

Respecting all those complexities, it is nevertheless possible and will likely be helpful to state and summarize the situation in the most succinct and direct way one can. Here, then, is the problem in its most stark terms:

In the United States of America today, if even a single member or small group of members of the U.S. House or Senate are killed intentionally or die from natural causes, or if a catastrophic accident or hostile action leads to large numbers of losses, the political and policy implications of the resulting vacancies, and the manner in which replacements are chosen to fill those vacancies, can profoundly alter the political makeup of the Congress and resulting public policy.

In the House, the constitutional requirements of replacement only by direct election can leave Congressional districts without representation for protracted periods, change the balance of political power, alter who serves as Speaker, change the line of presidential succession, and prevent the body from achieving a constitutionally mandated quorum to legitimately conduct its business.

In the Senate, gubernatorial appointment of replacements, or protracted vacancies pending elections, can change the political makeup of the body, allow partisan political decisions by governors to overrule and effectively reverse the will of voters, alter or reverse public policies, change the line of succession to the presidency, affect confirmation of cabinet members and nominees to the Supreme Court, and potentially prevent the Senate from doing its business.

With our bicameral Congress, should either body become unable to function, most major responsibilities of the whole Congress would grind to a halt, including the ability to declare war,

raise revenue, authorize and appropriate spending, oversee administration activities, and countless other matters that would be of vital importance at a time of national crisis.

In addition to the issue of replacing members of Congress, it is also important, as the COVID pandemic has shown, to have rules and resources in place that allow Congress to work remotely in the event it is too dangerous or unwise to gather together in person.

Finally, though it is terribly unpleasant to contemplate, recent events indicate that we must also consider and have measures in place to deal with the possibility that attacks against members may come or be coordinated from within.

All these realities have been known for many years, but the threats have only increased while known and practical solutions have been ignored or resisted. That leaves our nation, the Congress, individual members of the House and Senate, and the broader free world extremely vulnerable. That vulnerability is exacerbated by shortcomings in Presidential and Judiciary continuity and by the interconnections of those institutions with Congressional continuity issues. In many ways, the failure to implement solutions to continuity of all three branches is an incentivize and reward for hostile domestic or foreign adversaries to commit acts of murder and other forms of violent disruption against members of Congress and the institution.

Practical, valid solutions can be implemented to reduce these individual and institutional risks but thus far the Congress has been unwilling to seriously confront the risks or implement the known solutions. It is vital to put those solutions into place while it is possible to do so and before they are needed.

Almost Every Other Important Institution in America Has Continuity Plans – But Not Congress

It is or should be a general axiom of life and organizational practice that the more important a position is, the more necessary it is for all who fill that position to make arrangements for their replacement. So too, as the consequences of failure to make such preparations become more serious, the irresponsibility of inaction becomes all the more egregious.

To put our own government's continuity shortcomings into context, it is worth considering that apart from the Congress, the Presidency, and the Supreme Court - virtually every other significant institution in our nation has in place mechanisms for prompt and seamless replacements of leadership in the event of vacancies.

The U.S. Military has an endless chain of command and redundancies at every level of rank. It would be folly to do otherwise. Of lesser consequence but more familiar to many Americans, in the NFL there are at least two backups for nearly every position player. If the starting quarterback goes down, on the very next play a substitute has taken his place. In the corporate world, boards require well designed and clearly spelled out contingency plans to deal with vacancies. At a more personal level, all responsible parents designate loving and able caregivers who can take over responsibility for children in the event a tragedy strikes and claims the lives of the parents.

In addition to the fact that each of these examples illustrates the importance of continuity plans, two things must be emphasized. First, in none of these examples is it acceptable practice to simply leave the vacancies unfilled for protracted periods of time. Second, in none of the examples are adversaries or competitors given the authority to designate the replacements or surrogates.

We don't wait to fill vacancies in the military chain of command during wars, and neither do we let our adversaries choose to replace our military leaders with theirs - that would obviously be insanity. As parents we don't just leave our kids to fend for themselves till someone gets around to caring for them, nor do we choose people who might hate us to be guardians of our children. In football games, if the Bengals quarterback had been injured in the Superbowl, the Rams would not have been allowed to put one of their players in as a replacement (if that were allowed, "roughing the passer" would likely be a far more serious problem than could be deterred by a mere fifteen-yard penalty and an automatic first down).

These examples sound absurd because, in fact, they would be absurd. But if those examples are absurd, why then do so many accept without question the practice of waiting months to fill House vacancies or allowing governors from the opposite political party to replace deceased (even assassinated) senators with someone who the voters did not choose and who may be diametrically opposed to everything the deceased Senate predecessor stood for?

Precedent May Not Work As It Has In The Past

Some argue that under normal circumstances it makes sense by default to stick with procedures that appear to have worked well or at least adequately for many years. Others will simply assume, without actually investigating the matter, that someone else must have already solved everything so there's no need to worry. But, if there is one striking lesson that emerges from the past two decades, the lesson should

be that we cannot assume what has worked in the past will continue to work in the future.

In each of the biggest failures, and tragedies, in recent history, those failures have happened because people, including policy makers, collectively assumed that things could go on as they always had. Because of that assumption, they did not recognize that situations can change suddenly and render established procedures ineffective or, worse, unintentionally designed to fail or be exploited in unexpected ways.

The attacks of 9/11 are one example with terrible consequences. When one reads the report of the 9/11 commission it is evident that red lights were flashing about unexpected threats from adversaries who might exploit unrecognized vulnerabilities in security systems and procedures. But the overriding inertial assumption that things would be just fine enabled the 9/11 attacks to largely succeed, and those attacks then led to disastrous wars in Afghanistan, Iraq and a host of other ramifications that are still playing out today and have profoundly harmed our nation and the world.

On the economic front, "The Great Recession" of 2007 was caused by multiple factors, but one essential ingredient was that people failed to appreciate that if certain conditions caused a failure of one institution or aspect of our financial sector, those same conditions might/would simultaneously cause comparable failures in other institutions and that combination would overwhelm any backstop or insurance that had not accounted for such simultaneous failures. This is admittedly an oversimplification of a complex event, but it is certainly not in error to state that many of those in charge at the time believed the existing requirements for financial coverage, mortgages and other loans were adequate to prevent or resolve any challenge. That assumption was obviously profoundly mistaken.

Looking specifically at Congressional vulnerability, the Congress narrowly avoided the loss of numerous members in 2017 when an assailant wielding a semi-automatic assault rifle began gunning down members of the Republican baseball team during an outdoor practice. In hindsight, it may be obvious that what seemed like an innocent baseball field could easily have become a killing zone, but it was only the result of uncommon, and as it turned out fortunate, circumstances that security officers were present that day and able to confront and help neutralize that gunman. On many prior days no such security was anywhere near either the Republican or the Democratic baseball practices.

More recently, the COVID virus has revealed a lack of preparedness to deal with how a pandemic might impede the functioning of Congress. So too, the January 6th assault again overwhelmed established procedures because nothing like that had ever

happened, so the preparation to deal with it was inadequate. The habitual assumption and precedent of a peaceful transition of power was shockingly disrupted, leaving the Capitol, the Congress, and the democracy incredibly and dangerously vulnerable.

In each case above, in hindsight one can see that what happened could have been foreseen, and in each case some people did foresee things. My own father, for example, asked me two days before he died of pulmonary fibrosis in February of 2001, if I worried that hijackers might one day fly planes into the twin towers. Seven months later they did just that. But in none of the above cases, was there sufficient preparation beforehand to prevent the disaster from happening and in each instance that lack of preparation was in significant part because people assumed that things would continue to go and work just fine as they always had.

Bringing this back to the topic at hand, all the above examples and many more should caution us that it can be a profoundly consequential mistake to assume that because Congress as a whole has continued to function under past circumstances, that means we can or should rest assured that we are prepared to deal with whatever might come along today. The fact is, we are not prepared.

The U.S. House of Representatives - Current Procedures for Replacement of Vacancies in the House and Flaws In That Approach

Under the Constitution, the only way to fill vacancies in the House is through direct election. No one has ever served as a voting member of the U.S. House of Representatives without being directly elected. This fact is a source of justifiable pride for many who serve in the House, but it can also be an excuse for intransigence that creates multiple and significant vulnerabilities to the members themselves, to the House as an institution and to the nation.

The Constitutional Quorum Requirement

The Constitution clearly states that "a Majority of each shall constitute a quorum to do Business". In the current number of the House that means a quorum should be 218 members, i.e. one more than half of the 435 voting member, while in the Senate a quorum is just over one half of the 100 total members, i.e. 51.

In the normal course of every Congress, vacancies have occurred from time to time for a variety of reasons including death, resignations, appointments to other positions, criminal convictions, or other causes. Since the Civil War, such vacancies have been dealt with through a House rule, which is not in the Constitution, that effectively redefines the total number of members of the House and Senate not by the number of

possible voting seats but based on the number of members “Chosen, sworn and living.” This adjustment in the ‘provisional’ number of the “full” House and Senate, has the effect of also lowering the number considered to constitute a quorum.

For example, if, for whatever reasons, four seats become vacant in the House, the “provisional number of the House” would be lowered by four, to 431, thereby lowering the quorum number from 218 to 216. Similar adjustments are made in response to vacancies in the Senate.

Though perhaps not perfect, this process has previously served the Congress and the nation adequately well and has been largely accepted without question as each new generation of House and Senate members votes to approve the rules and procedures of their respective bodies without giving the matter much thought. It is important to note, however, that this downward adjustment in the modern era has never been done to such a degree that the ultimate number of those required to present for a quorum actually fell below the majority of the total possible voting seats.

But is this adjustment valid or wise when examined in detail and is it the only or the best way to deal with such vacancies? Simply put, the answer to each of those questions is NO.

The Risk of Catastrophic Losses and Failure to Achieve a Quorum

As the Continuity of Government commission studied in detail following the attacks of Sept 11, 2001, if enough members perished in a concerted terrorist or foreign power attack, highly lethal pandemic, natural disaster or other tragedy, the numbers of living members in one or both bodies could fall below that required to do business.

In a bicameral legislature, if one or both chambers cannot convene a quorum, much of the legislative activity would grind to a halt or, if continued, would be conducted in a way that is constitutionally questionable. That scenario would also leave many states without representation and could dramatically alter the political makeup of the institution without an election. None of those outcomes is desirable in times of acute national crisis nor are they necessary if an alternative approach is implemented.

House Rules Changes for Catastrophic Vacancies

Following the events of September 11, 2001, House rules were changed to stipulate that in the event of mass casualties in the House, an extended quorum call would be announced by the Speaker or a surviving designee of the Speaker, chosen from a secret rank ordered list previously created and filed with the Clerk of the House. Under this rule change, which supporters asserted follows from the “chosen, sworn, and living” of

the Civil War era, whomever responds to the extended quorum call would then be tallied and the total number of surviving respondents would be considered to comprise the new provisional number of the House.

This means in practice that no matter how many states or districts this left without any representation in the Congress, and regardless of how small the new provisional number of the House is counted to be, half of that reduced number would be deemed to constitute a quorum. From that, it also follows that if that markedly diminished quorum number is met, half of that quorum number would comprise a voting majority.

It is important to note that, contrary to the Constitution, in the current rules of the House, there is no specified minimum number of the House or of the resulting quorum.

It is impossible to imagine the framers or the members of the first Congress in 1789, who created a representative form of government, and who themselves repeatedly delayed the start of the very first Congress for lack of a true quorum, would have been pleased with or accepted this as a "solution" to congressional continuity.

The Implications of A Congress Continuing With Multiple Vacancies

It is important to appreciate what the resulting micro "House of Representatives" (which would in fact no longer be representative) would be able to do with the fractional majority, of a fractional quorum, made up of a fractional group of survivors.

Most notable among the functions would be election of a new Speaker, which, in a normal Congress is the first order of business upon convening. This is of profound consequence because under the Presidential Succession Act of 1947, the Speaker of the House is next after the Vice President in the line of Presidential succession. Thus, if the President and Vice President have perished along with the Speaker, under the reduced quorum provisions as few as a handful of surviving House members could effectively chose anyone at all they wanted as the new Speaker. The Constitution simply stipulates that the "House of Representatives shall chuse their Speaker and other Officers..."

Which means, just a few people, conceivable even some who have been covertly involved in creating the conditions that produced the casualties to begin with, could, without an election, select the Speaker who would then become the new President. If that possibility is not troubling enough, the new "President" would then, presumably, be granted access to the nuclear launch codes with virtually no checks on their authority, save for the minute number of survivors who chose the "Speaker" now "President" for the position to begin with.

It is inconceivable that such a process or outcome would have been condoned by the framers of the Constitution or that it can be considered a wise, prudent, or responsible course of action by the American people today.

Yet, that is precisely the situation today, at least according to the current Rules of the House of Representatives and the tradition of adjusting the quorum as a way to cope with vacancies.

The Time It Takes To Hold Elections

The diminution of the requisite quorum number was actually proposed initially as a temporary measure to allow something called a “Congress”, no matter how small or unrepresentative, to meet until special elections could be held to replace House members. We have already described in detail the problem with that diminished quorum, but we must also consider how long it might take to hold election to restore Congress to its true and intended size of 435 voting members.

Special elections for Congress, including a primary and general election, can take many months to accomplish even under normal circumstances. While legislation was enacted post 9/11 to require states to be able to complete both primary and general elections within a maximum total of 45 days of catastrophic losses, there is in fact no compelling evidence that this can or has been done.

The physical infrastructure and procedures necessary to actually conduct credible primary and general elections, particularly under crisis situations, simply do not exist at present and may in fact be impossible to implement in such a very short time period across all States and municipalities. In fact, nearly all special elections since enactment of that legislation have taken far longer than 45 days and, in several instances, it has been apparent that such elections were intentionally delayed for political purposes.

Further, if states or districts conduct special elections on different time frames, as is likely to happen after a catastrophic event, it is possible that each separate special election could change the makeup of the House and possibly alter the balance of power. This could easily create repeated and chaotic changes in critical positions such as the Speaker, Committee Chairs, Committee makeup etc. (This is especially consequential when, as mentioned before, one considers that under current law, the Speaker is third in the line of Presidential Succession)

All this must also be considered in light of the possibility that the same factors that created vacancies in the House could also afflict states and municipalities, thereby

rendering special elections even more difficult to conduct in a way that fairly enfranchises all eligible candidates and voters.

The Tasks That Must Be Done When Congress Cannot Meet

Even if it could be demonstrated that valid special elections can be held in 45 days or less, there is still the large and important question about what happens in the interim until such elections can be held.

Consider first that vacancies in the House or Senate deprive the affected states and districts the voice and representation of interests that is the bedrock of a democratic republic such as ours. Allowing the Congress to keep functioning and making decisions that impact the entire nation, perhaps to the advantage of some states or districts and the detriment of others, while many states or districts lack any representation at all, is clearly not consistent with the intent of the framers or the most basic tenet of our government.

We must also consider the kinds of issues that would arise and the kinds of decisions that have been and would need to be made following significant losses or even selected, targeted assassinations.

In the days immediately (not 45 days) after the September 11, 2001 attacks, Congress met to authorize the use of military force to pursue and punish the perpetrators, to revise the laws governing surveillance of suspected terrorists, to authorize support for survivors of the attacks, to appropriate special funds for military operations, to conduct an investigation into the attacks and a host of other important and urgent matters. Had many members been killed on that day, as easily could have happened, it would have been terribly unwise and impractical for all activities of the Congress to be suspended until special elections could fill all the vacancies.

The Danger of Changes In Political Power Due To Protracted Vacancies

As mentioned several times in this document, the requirement of direct elections to fill vacancies in the House also raises the possibility that the results of the most recent general election could effectively be altered, thereby changing the political balance within the House.

This can happen because non-random losses could be more acute among some states or within one party as compared to the other. While the election requirement for House replacements would at least allow voters to decide what comes next, until those elections could be held, the voting majority in the House could be much different than that intended by the voters in the past election.

In very real and troubling ways, this reality raises the possibility that accidents or natural disasters could alter the political makeup of the Congress. More troubling still, malevolent individuals or groups, including foreign powers, terrorist organizations, or even domestic insurgents, could seek to achieve through violence what they were unable to accomplish through elections.

The U.S. Senate - Current Procedures for Replacement of Vacancies in the Senate And Flaws In That Approach

In offering the analysis of Senate replacement procedures that follows, I want to emphasize that this portion of my testimony reflects my personal assessment of the situation. The Commission Report itself, which we submit as a group to the committee today, and which I fully support and endorse, does not go into detail about the Senate procedures.

Because I believe there are sufficiently important and problematic issues with current Senate continuity procedures, I am conveying those concerns and my analysis separately here for the consideration of the Committee should it choose to address such matters now or in the future. Nothing I am suggesting contradicts the full Commission report. Rather, it should be considered an addition, again, based on my personal analysis. While I have great loyalty and respect for the commission and my fellow commissioners, my greater loyalty is to the well-being of the nation and I believe there are very troublesome, indeed potentially dangerous, issues with Senate continuity that must be addressed but are not included in the Commission report. I also believe that much the same solution as is recommended for the House can also be applied to the Senate. In fact, it may be much easier to implement those solutions because a constitutional mechanism for doing so is already in place.

Background

Senate continuity measures derive from provisions of the 17th amendment to the Constitution which, when ratified in 1913, transferred the constitutionally designated power to choose senators from the state legislators (as was the practice originally specified in the Constitution) to a direct vote of the people in each state.

The Amendment reads:

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State

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shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution."

I want to emphasize from the outset that there is likely near unanimity among the American people in favor of direct, as opposed to legislative, election of Senators. Problems, however, arise from the second clause, which grants the executive of each state, the governors, the authority to make temporary replacements to fill vacancies unless the legislator specifies an alternative.

Presently forty-five states authorize governors to fill vacant U.S. Senate seats by direct appointment, with only seven of those states having a requirement that replacements must come from the same political party as the previous incumbent. In the remaining five states, Senate vacancies can be filled only by special elections. Requirements for when special elections or general elections will be used to fill vacancies vary across states, with some requiring special elections to be called while others allow replacements to occupy the seat until the next regularly scheduled general election.

I have prepared and offer below what I hope will be an instructive chart showing the current makeup of Senate Membership as of April 4, 2022, showing party affiliations of the Senators, the respective State Governors, and the Senate replacement provisions currently in place for each state.

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Political Affiliations of Current Senators and Governors Plus Corresponding State Laws
for Senate Replacements

State	Senate	Gov	Replacement	
Alabama	R - R	R	Gov Choice	
Alaska	R - R	R	Gov Choice	
Arizona	D - D	R	Gov Choice - Same Party	
Arkansas	R - R	R	Gov Choice	
California	D - D	D	Gov Choice	
Colorado	D - D	D	Gov Choice	
Connecticut	D - D	D	Gov Choice	
Delaware	D - D	D	Gov Choice	
Florida	R - R	R	Gov Choice	
Georgia	D - D	R	Gov Choice	
Hawaii	D - D	D	Gov Choice - List of 3 same party	
Idaho	R - R	R	Gov Choice	
Illinois	D - D	D	Gov Choice	
Indiana	R - R	R	Gov Choice	
Iowa	R - R	R	Gov Choice	
Kansas	R - R	D	Gov Choice	
Kentucky	R - R	D	Gov Choice - Same Party	
Louisiana	R - R	D	Gov Choice	
Maine	R - I	D	Gov Choice	
Maryland	D - D	R	Gov Choice - Same Party from party list	
Massachusetts	D - D	R	Gov Choice	
Michigan	D - D	D	Gov Choice	
Minnesota	D - D	D	Gov Choice	
Mississippi	R - R	R	Gov Choice	
Missouri	R - R	R	Gov Choice	
Montana	D - R	R	Gov Choice- Same Party	
Nebraska	R - R	R	Gov Choice	
Nevada	D - D	D	Gov Choice	
New Hampshire	D - D	R	Gov Choice	
New Jersey	D - D	D	Gov Choice	
New Mexico	D - D	D	Gov Choice	
New York	D - D	D	Gov Choice	
North Carolina	R - R	D	Gov Choice - Same Party	
North Dakota	R - R	R	No Temp - Special within 95 days	
Ohio	D - R	R	Gov Choice	
Oklahoma	R - R	R	No Temp - Special in odd # years	
Oregon	D - D	D	No Temp Special if > 61 days out	
Pennsylvania	D - R	D	Gov Choice	
Rhode Island	D - D	D	No Temp Special Earliest possible	
South Carolina	D - D	R	Gov Choice	

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South Dakota	R - R	R	Gov Choice	
Tennessee	R - R	R	Gov Choice	
Texas	R - R	R	Gov Choice	
Utah	R - R	R	Gov Choice - List of 3 same party	
Vermont	D - I	R	Gov Choice	
Virginia	D - D	R	Gov Choice	
Washington	D - D	D	Gov Choice	
West Virginia	D - R	R	Gov Choice - Same party	
Wisconsin	D - R	D	No Temp Special 62-77 days	
Wyoming	R - R	R	Gov Choice - Same party	

Note: If a member is Independent or a member of the DFL but caucuses with one party they are counted as a member of that party for purposes of this chart

LEGEND

States with divided Senate delegations

States with all Democratic Senators and a Republican Governor

State with all Republican Senators and a Democratic Governor

State in which a Governor could currently appoint at least one replacement from a party different than the deceased. In total there are 11 Senators whose assassination or natural death could change the political balance of power through gubernatorial appointments.

States in which vacancies are not filled by appointment but by special or regular election depending on when vacancy occurs. In total there are now 10 Senators whose assassination or natural death could create vacancies that change the balance of power at least until an election can be held

Sources of Information for this Table

Congressional Research Service Report Dated 8/21/2021 https://www.everycrsreport.com/files/2021-08-20_IF11907_5e406f4711dbfd13ea3dee0b41a778b674690cc2.pdf

National Council on State Legislatures Data from 5/6/2021 <https://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate637302453.aspx>

(Note, changes may have been made or may yet to be made during the current legislative sessions in 2022. Such changes would not be reflected in this chart or the cited references.)

As we consider this chart and the current makeup of the Senate, it becomes apparent that with a closely divided Senate, as we now have, the death of a single member from states where governors are from the opposite party of the deceased would enable those governors to appoint members of their own party thereby changing the majority control of the Senate. Though one truly hates to acknowledge it, this condition may well create an invitation to violence as a means of achieving a political transformation. In light of recent events and the current climate, that possibility, though odious, cannot be denied.

It must also be recognized that the potential for profoundly consequential shifts in party control can just as easily occur from accidents or natural causes. On a regular basis many members of the House and Senate return to their districts on the same flight. So

too, when members of Congress attend their respective annual party retreats, they typically travel as group in busses or trains. This means the crash of a single plane, bus or train could easily take out significant numbers of House and Senate members.

Less dramatic, and more probable, with the average age of U.S. senators now at 63, and more than one out of four senators over 70 years old, there is a relatively high likelihood that in any two-year period at least one senator may die or become incapacitated from natural causes. Most recently, one of the youngest members of the Senate suffered a stroke that could easily have proven fatal, and in prior years several senators have sustained strokes that left them severely impaired. The COVID pandemic has only heightened the risks - killing a sitting member of the House, claiming one member elect, and striking many others with significant illness

Beyond the tragedy of the potential deaths or incapacities themselves, the 17th amendment and its flawed mechanism for replacements raise the very real specter that control of the Senate, and all that entails, could happen not only without an election but in direct contradiction to the prior election results.

This should not be a partisan issue because, in an evenly divided Senate, both sides are nearly equally vulnerable. If the current Senate majority were to be changed by the deaths of one or more members of that party, the initiatives of the President and his or her party could then all be blocked by the new Senate majority. What is more, that new majority could then more effectively block any Supreme Court or other federal court nominees, thereby changing the makeup of the courts for a lifetime. Conversely, if a member of the Senate perished from the party opposite the President, that would more easily enable the President to have his or her way without meaningful opposition from the minority party in the Senate.

This is not just dangerous - it is patently antidemocratic. The irony is that the 17th Amendment was intended to be a democratizing measure by taking power to choose senators from the relatively small numbers of state legislators and granting it instead to the totality of the voters through elections. But in its replacement provisions, the same amendment took all power back from the voters and vested it by default with a single individual in the form of the governor.

Placing that much power in the hands of one individual in each state, who can then wield that power to effectively overturn the results of an election and unilaterally appoint someone who may be antithetical to the expressed will of the voters, is contrary to virtually every democratic principle on which this nation was founded.

Protracted Vacancies Until Special Senate Elections Can Be Held

While gubernatorial selection of replacements carries the problem of governors making potentially partisan political appointments, requiring Senate replacement solely by election provides no assurance that a vacancy caused by an assassination or other event will not alter the partisan makeup of the Senate as a whole. In an evenly divided Senate, if a seat that is held by the same party as the Vice President becomes vacant, the VP no longer assures their party of a tie breaking vote, thereby eliminating the advantage for the President's party. If two Senators from the same state and party perish, the majority control then shifts entirely.

Leaving seats open until elections can be held carries the additional shortcoming that for the duration of the period until the election is held and decided, the voice and voting power of the impacted state is diminished in the Senate by half, or if both Senators are killed, entirely silenced. This can leave tens of millions of Americans with no voice in the Senate. Again, this outcome is thoroughly inconsistent with the basic principle of our democratic republic – i.e. the principle of each individual and state having representation in Congress when decisions are made.

Mass Casualties and Senate Replacements

The importance and impacts of even single losses of Senate should be reason enough to seek changes to continuity measures, but the problems are amplified in the case of multiple casualties.

The first problem of large Senate casualties would be the loss of a legitimate quorum. The Senate has followed the tradition of counting members who are "chosen, sworn and living", which carries the problems that have already been articulated in this document in the opening section about the quorum. Those problems will not be reiterated here but they all apply.

Because there are substantial differences in how states replace Senate vacancies, in a mass casualty event it could well happen that states with more rapid replacement procedures could collectively restore the quorum and resume operations, while other states would be left out. This not only undermines the core principle of equal representation by all states in the Senate, it also, again, raises the potential for substantial partisan differences. For a variety of reasons, it is also likely that the losses of members might not be randomly or equally distributed. This increases the likelihood of certain states, regions, or ideological perspectives surviving while others perish.

What Is Needed - The Criteria To Be Met

The status quo in both the House and the Senate is clearly unacceptable and must be remedied. The question then becomes, how do we evaluate what the various possible solutions should achieve?

To organize our thinking about this, it may help to consider the following criteria that can guide consideration of the status quo as well as any proposed remedy. It is important to emphasize here that the natural human tendency to apply a more jaundiced or critical eye toward a new system while accepting the status quo without question can be, for all the many reasons described in this document, especially dangerous in this context.

I believe a careful, systematic analysis of the current mechanisms versus proposed alternatives will clearly reveal the status quo to be profoundly flawed in and of itself and particularly so when compared objectively to the alternatives which will be proposed shortly. The following list enumerates some of the most salient criteria against which we should evaluate all possible continuity provisions.

1. Vacancies should be filled rapidly so citizens have continued representation and the government can respond immediately in a constitutionally valid way to whatever crisis created the vacancies.
2. To ensure full representation, the quorum to do business should not be lowered to any level below the constitutional mandate of a majority of the full number of voting members in the House and Senators - those full numbers being 435 and 100 respectively.
3. Any solution to replace members through methods other than direct election should only apply in the event of the death or certified incapacity of the member who formerly filled the seat. This measure prohibits, or at least significantly reduces the possibility of someone trying to put in place a favored successor without an election. For that to happen, the person designating the successor would have to die, which is a stiff price for such manipulation.
4. All vacancies, including those that have been filled by temporary replacements, should be filled as soon as practical, and without any politically motivated delays, through direct election, be that a special election or a regularly scheduled election, depending on the time the vacancy occurs. This measure assures that the right to elect representatives or senators is in no way diminished from the status quo situation in which replacement must be elected. Voters should still be able to vote for the ultimate replacement just as rapidly as possible.

5. To the greatest degree possible any solution should replicate the political and ideological makeup of the two chambers as it existed prior to the crisis. It is undesirable and dangerous for terrorist attacks, calamitous events, or other circumstances to arbitrarily or intentionally change the political makeup that the voters chose in the regular election. (One might wish that under such circumstances no responsible individual would seek political advantage, but recent history and experience shows this is far from assured.)

6. Replacements should be well qualified individuals who are familiar with the respective districts or states and, ideally but not necessarily, have experience in government and legislation. This will allow the institutions to resume functioning promptly and efficiently when new members are sworn in.

To assist in evaluating various alternatives, the chart below includes the criteria above and several other considerations. Members or staff weighing the pros and cons of various alternatives may find this a useful way of comparing the options.

Draft Criteria Grid For Evaluating Continuity Solutions

Criteria	Current House	Current Senate	Proposal 1	Proposal 2	Proposal 3.
Only applies in the event of the death or sustained incapacity of the member					
Ensures the most rapid practical replacement and continued representation of all states and districts					
Protects the constitutional definition of a "majority" to achieve a quorum					
Protects the ability of citizens to elect their representatives					
Preserves and restores the political/ideological makeup as it was before the vacancies occurred					
Reduces the incentives or rewards for hostile actions					

Hon. Brian Baird

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Continuity of Congress

against members or the institution					
Has a high likelihood of providing well qualified replacements prepared to serve					
Provides multiple levels of legitimate "backup" replacements					
Does not entrust one individual to appoint multiple replacements					
Allows Congress to meet remotely if it is unsafe or impractical to physically convene					
Assures that the political alignment of presidential succession is the same (it is hoped this will be addressed in the presidential continuity work					
Addresses Staff and support continuity as well as member continuity					
Other Considerations					

The Preferred Solution for House Vacancies

As described in the full Continuity of Government Commission report, the recommended solution for vacancies in the House is for all House vacancies created through the death of a sitting member to be filled by immediate appointment of a replacement previously designated by the elected member as part of a rank ordered list of successors filed with the Clerk of the House and the appropriate officials within the member's respective state.

Without reiterating the specific wording of the Commission report, I have shared below a slightly different description, with the most notable difference being the inclusion of Senate replacements by a similar mechanism as that of the House. Again, I emphasize that this is my personal judgment and recommendation, not that of the Commission as a whole.

The Solution Of Member Designated Replacements

It is recommended:

1. That House and Senate Rules immediately be modified, and then measures be taken to propose and ratify a corresponding constitutional amendment, to do the following:

A. Require and empower members of Congress, including both the House and Senate, to designate a confidential, rank ordered list of individuals who meet the requirements for service in the elected member's position.

B. That list shall be filed with the Secretary of State or other appropriate officer of each state and with the clerks of the House and Senate.

C. In the event of the elected member's death or certified incapacity, the said officer of their state shall contact the first person designated on the list and ask if they are able and willing to serve in the now vacant position until such time as a special election can be held.

D. If the individual is able and agrees to serve, the officer of the state shall announce publicly that person as the designated temporary Representative or Senator for the respective position.

E. If an individual on the list is unable or refuses to serve in office, the officer of the state shall contact the next person on the list and proceed in such a manner until the position is filled.

F. At such time as a so designated member is selected and is publicly announced, they will be sworn in to office as quickly as possible by the highest ranking elected official of their state and, thereafter, shall be afforded all the privileges and responsibilities of the position.

G. If the designated successor should also perish or become incapacitated after taking office, the officer of the state shall return to the list filed by the original elected member to seek the next person in order to fill the seat.

H. As soon as practical and safe after vacancies occur, the states shall hold special elections for the purpose of electing Representatives or Senators until the regularly scheduled general election can be held.

The Preferred Solution for Senate Vacancies

As with the House, I strongly believe the preferred solution is for is for all Senate vacancies created through the death of a sitting member to be filled by immediate appointment of a replacement previously designated by the elected member as part of a

rank ordered list of successors to be filed with the Clerk of the Senate and the appropriate officials within the member's respective state.

The pathway to implementing this solution is different from but easier than that for the House. Remember that the 17th Amendment contains this language

That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

It is that language that has allowed the states to adopt the various and mechanisms and timeframes for replacement that we have been discussing. While we have identified how the present procedures are flawed, it is also possible that without having to further amend the Constitution, state legislatures have the power to change their U.S. Senate replacement procedures for the better. In so doing they could solve nearly all the problems we have been describing. Here is how that can happen.

Under the 17th Amendment, each state legislature can act to empower U.S. Senators to identify a sequential, rank ordered list of individuals who would temporarily fill the vacancy only in the event of the incumbent's death or incapacity and only until such time as special or regularly scheduled elections can be held. The executives of the states would be required to select replacements from those designated in order on such lists. For security purposes, the list of temporary replacements should be kept confidential and would be filed with the Secretary of State of each state and with the Clerk of the Senate, to be opened only on the death or certified incapacity of the incumbent.

These are the merits of this approach.

1. If all legislatures adopted this, every vacancy, be it of a single individual or a mass casualty situation, could be nearly instantaneously filled, thereby ensuring both the continuity of the institution and continued representation for all districts and states. This method also provides for continuity of the institution as a whole and ensures continued, virtually uninterrupted representation, regardless of whether the cause is a natural event, accident, or malevolent act.
2. This method is the most likely of all to preserve the will of the electorate because the voters chose the incumbents in the most recent Senate elections. Those elected House and Senate members, who voters authorized to make decisions on everything from tax policy to declarations of war, are in the most justifiable position to select their temporary replacements, but only if they perish or become incapacitated (this must not become an "easy way" to pass the office on to a relative or political crony). So too, because it will be their last official act, the incumbents will naturally be inclined to select temporary successors who share their essential ideological and political perspective.

3. Replacement members selected in this way would be more likely to have a sense of obligation to faithfully carry on the practices and positions of the incumbent, who had been initially chosen by the voters of the state or district. Without inserting the word or concept of political party into the Constitution, something that has never been and, in my opinion, should never be in the document, this proposal provides a mechanism for continuity of the political/ideological makeup resulting from the most recent election.
4. By ensuring that partisan or dramatic ideological shifts will not result from Senate or House vacancies, the promise of replacement by temporary incumbent selected successors substantially reduces the incentive for and gains to be had from terrorist acts, foreign aggression, assassination, or other actions intended to shift the balance of political power. If it is known that the loss of the incumbent will almost certainly result in a replacement of his or her choosing, and of similar ideology and party affiliation, there is much less to be gained politically from seeking to harm the incumbent.
5. This method is also likely to produce well qualified temporary successors because the incumbent should have personal knowledge of the qualifications and qualities of many possible temporary replacements. Further, the incumbent's personal legacy will be at stake so they will be motivated to identify individuals of character who will capably carry on the duties of the position and the example set by the incumbent.
6. This method reduces the potential for dramatic and recurring changes in partisan balance because if all states follow the practice there will be no or very few initial gaps left unfilled and when elections are held for replacements those elections can take place in a less hurried and more consistent timeframe across all the states.
7. By providing for member selected temporary replacements until special or regular elections can be held, this method preserves the rights of voters to express their preferences at the ballot box. Nothing in this proposal takes away or diminishes the rights of voters compared to any of the current procedures for filling vacancies. Special elections can still be held as quickly as practicably possible and just as rapidly as they would be if there were no temporary replacement in place.
8. This proposal very rapidly restores and maintains the full numbers of the House and Senate and their respective quorums at regular levels as intended by the framers without lowering the total number or the corresponding quorum below that proportion which was originally defined by the Constitution.

9. This provision also avoids the complexities of trying to determine a fixed "cutoff" level or number of losses necessary to trigger different replacement procedures. It is impossible to anticipate all the variations in continuity circumstances so a single fixed criterion is an unwise and impractical standard. Replacing all vacancies caused by death is the more practical and sound solution.
10. Perhaps the most important benefit of all is that even in the most catastrophic of events, such as a concentrated attack on the Capitol that kills all or nearly all members of Congress, well qualified successors could rapidly be identified for every fallen member of the body, thereby enabling the entire Congress to be restored in less than 24 hours. This is an incredibly powerful reassurance not only to the American people but to the free world. It ensures that our representative democracy and our system of checks and balances will be restored and maintained even in the most dire of circumstances.

Examples Of Similar Provisions in State Level Continuity

The risks of the status quo and the benefits of the proposed alternative should be sufficient to make the case for the proposed solutions, but we can also find reassurance in the fact that very similar provisions are already in place in a number of states.

The National Council of State Legislatures has reviewed continuity provisions in every state <https://www.ncsl.org/research/about-state-legislatures/emergency-interim-succession-acts.aspx>, revealing that some mechanism of temporary replacements exists in multiple states.

For example, Alabama's continuity statute reads,

"Ala. Code §29-3-4

Each legislator shall designate emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.(Acts 1961, No. 875, p. 1371, §4.)"

Louisiana also provides for similar replacement

La. Rev. Stat. §24:64.

Each legislator shall designate a panel of not less than three nor more than seven emergency interim successors to his powers and duties. Each legislator shall review and, as necessary, promptly revise such panel of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified

emergency interim successors on said panel. Such panels and all revisions thereof shall be filed in the office of the secretary of state.

Oklahoma has a comparable provision.

Okla. Stat. §63-686.4.

Each legislator shall designate not fewer than three nor more than seven emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.

Laws 1959, p. 215, § 4; Laws 1963, c. 340, § 4, emerg. eff. June 24, 1963

We often talk in our country about the states being the laboratories of the republic. In this case, at least some of the states have been far ahead of Congress in finding cures for the problems of succession. The Congress would do well to learn from those measures and implement them as quickly as possible.

Under the 17th Amendment, States already have a right to choose whether or not opt for this solution as a replacement process for U.S. Senators, but if they choose not to do so, they should make that choice knowing they are exposing themselves and the nation to all of the machinations, politics, and autocratic power usurpations described above.

Legislators and, most importantly, the voters in every state should recognize that it is in their best interest to provide for rapid replacements that ensure the will of the voters is maintained and that the state will have continued representation in both the Senate and House as decisions of major consequence are made in Congress. Legislators and voters should also be aware that by failing to address the problems of partisan gubernatorial Senate replacements, they may be exposing their own elected senators (and, we must add, potentially, if you think about it, their governors as well) to an elevated personal risk.

Establish the Rules Immediately – Then Ratify an Amendment

It is in the interest of the nation, all the states and of the citizens themselves that the proposed recommendations be implemented as quickly as possible. The reality, however, is that many of the proposed changes, particularly those regarding temporary House replacements, should ultimately be formally established through an amendment to the Constitution. However, as a practical matter, constitutional amendments can take a very long time to enact and, until that time, our nation would be left unnecessary vulnerable to our adversaries or natural events.

Knowing the potential risks and the many shortcomings of the status quo, it is unwise, possibly irresponsible, for Congress not to act immediately to put in place at least a provisional remedy that could ensure its own continuity in a time of crisis.

Therefore, it is recommended that Congress should enact the proposal as a House and Senate rule initially, notify the states of its enactment, and proceed accordingly to prepare the requisite lists and procedures for replacements should the need arise. From there, work on the formal amendment can take place.

Other Necessary Measures

As noted above, Congress should start with assuring its own continuity, but it must also act quickly update and modify the Presidential Succession Act and ensure that its provisions align logically and seamlessly with congressional continuity. Congress should also establish a valid and rapid mechanism to ensure continuity of the Supreme Court following a crisis.

In addition, because it is possible that the same conditions that may create large numbers of vacancies in the Congress could also make it unsafe or unwise for Congress to convene in the Capitol. And, in fact it may be unsafe under certain conditions to physically convene in any other single place, Congress should implement procedures for conducting all of its functions remotely if necessary until such time as it is safe and prudent to gather in person.

Finally, in order for Congress to function, a certain number of critical staff positions, e.g. parliamentarians, clerks, etc. must also be provided. Therefore, a comprehensive continuity initiative should establish mechanisms for designating, training, supporting and compensating staff who could, if needed, fill in immediately and seamlessly if necessary.

If An Event Occurs

As difficult as it may be to contemplate our own demise, we know the power and prevalence of weapons of mass destruction; we know that foreign and domestic terrorists wish to harm our government; and we also know now how disruptive a pandemic of even moderately lethality can be. All of that cannot, must not, be denied and we can never know if or when something catastrophic might occur.

We must ask, if suddenly the entire Capitol and its surroundings were vaporized by a nuclear armed hypersonic weapon or contaminated by a deadly bacteria or virus, what would happen next. We must also ask what would happen if a concerted attack focused exclusively on members of one party or another and thereby dramatically altered the makeup of one or both chambers.

The answer, if Congress enacts the proposed measures of temporary member designated replacements (to serve only if the member dies or becomes incapacitated through unexpected events), is that even after a completely decapitating attack on the federal government, or after a selectively targeted terrorist assault or assassinations, the Congress of the United States of America could return to full and legitimate function with complete representation and a comparable political makeup within twenty-four hours.

Not only would Congress reconvene, it would do so populated with mostly wise and carefully chosen statesmen and women, selected by their predecessors, knowledgeable about the people and places they represent, and comparable in party and ideology to those who came before. If conditions allowed, they could convene together in a different but safe location. If conditions did not permit physical presence, they could convene remotely.

Imagine the power of that extraordinary resiliency in continuity for our own citizens and for the free world. The very day after the worst event in American history, the Congress could resume to full function.

There would not be chaos or constitutional crisis in our government. The people of the United States of America would all have continued representation, they would have the same checks and balances envisioned by the framers and spelled out in the Constitution, and the federal government could then set immediately to deal with whatever is necessary to preserve our freedoms and our republic.

Gut Check

Before concluding, it is worth pausing for a moment to reflect on the values and motives that should guide our thinking and decision making when it comes to continuity of government and representation. If anyone reading this has evaluated the merits of this discussion and these proposals primarily or reflexively on a partisan calculation of "How will this affect my political party or power?", they should, as my long-deceased mother used to say, "Have their heads examined."

Tragedies and crises must not be opportunities for political gamesmanship or to circumvent the will of the people. The only legitimate metric to guide our decision making must be this question "What is in the best interest of the nation as a whole and what is most consistent with the principles of a constitutional democratic republic?"

Brian Baird, April 6, 2022

The CHAIRMAN. Thank you, Congresswoman Shalala and Ambassador Culvahouse.

Before we move to a period of extended questioning, I also want to just welcome two additional members of the AEI Continuity of Government Commission who are joining us today, two former members. Brian Baird, who represented Washington's Third District in the U.S. House from 1999 to 2011; and Mike Bishop, who is with us virtually, who represented Michigan's Eighth District in the U.S. House from 2015 to 2019.

Congressman Baird and Congressman Bishop will be joining the Q&A portion of the hearing, so let's kick that off.

I now recognize myself and Vice Chair Timmons to begin a period of extended questioning of the witnesses.

Any member who wishes to speak should just signal their request to either me or Vice Chair Timmons. You can raise a hand, or if you are joining us virtually, you just raise your virtual hand, and we will be sure to call on you. And if someone mentions something that you want to pull on that thread, just give us the hi sign, and we are happy to jump in.

I want to start with our two guests that didn't get a chance to chat. I have a thousand questions, but let me start with you all, and I am going to ask you to keep it reasonably brief. But I am just curious why you got involved in this effort.

Mr. Bishop, if you want to start, I thought your story of how you jumped into this was very compelling, and if you can briefly just share with us how you got involved in this effort.

Mr. BISHOP. Certainly. Thank you, Mr. Chairman and Ranking Member Timmons, members of the committee. It is an honor for me to be here today. I am grateful for your time on this matter.

Well, I am a late addition to this commission, to answer your question, and having had a personal experience while serving in Congress, that really piqued my awareness and certainly my sense of responsibility to be a part of an immediate solution, which I think is to address an imminent threat to our democracy.

I was on the baseball field with my Republican teammates and colleagues back in 2016 when a lone assassin opened fire on us with a semiautomatic rifle. As you know, the shooter seriously wounded our good friend, Steve Scalise, and several others, and but for the heroic acts to defend us, there is no question in my mind that the assailant very well could have taken out all of us.

At the time, it was a—you know, for us, it was a personal matter. It was a matter of life and death. But it didn't take long to soon realize that this had far greater implications than just a human catastrophe. And in retrospect, I can't believe it took this event to make me realize, to make us realize the implications of what a planned attack on Members could mean to the institution of democracy.

But there is no question that we are all vulnerable, and this is just one illustration of the very grim realization that today we face a substantial number of ridiculously imminent threats to democracy. And a catastrophic event is just around the corner every day, and it can subvert the constitutional powers of Congress.

We live in a very dangerous world, and it is more and more every day. The growing threats of foreign adversaries, terrorism, extre-

mism, both foreign and domestic, and as you mentioned earlier, natural disasters are now—you know, we understand the implications of—the dramatic implications of a global pandemic.

Now more than ever, the threats exist that pose a threat to our country, and it is conceivable—it is at a time, which scares me the most, at a time of our greatest time of crisis, without a legitimate democratic government and no ability whatsoever to respond to a real existential crisis or threat.

And we are—we are all on notice. We have a real problem on our hands, and we can't afford to ignore it any longer. And it is not—it is not difficult to conceive of a single event, planned or otherwise, that would instantly render democracy powerless. And we have dodged a bullet in the past, so to speak, but who knows when our luck will run out.

So to answer your question, in summary, Mr. Chairman, the reason why I got involved in this commission is because I feel compelled to be a part of the solution of an imminent threat to our democracy and really the future of our country and every American citizen.

I really wish I was in Congress right now because I would—I would really want to do whatever I could to exercise every power I had in my office, leverage every resource of my office to take up this matter with a sense of urgency.

So thank you very much for allowing me to be here today. I am happy to answer any questions you might have. And I am grateful for your attention to this matter and for being a part of what you are doing today.

The CHAIRMAN. Congressman Baird, do you want to just briefly share your—

Mr. BAIRD. Thank you, Mr. Chairman, Mr. Vice Chair, members of the committee. It is good to see my good friend, Mike Bishop, here. And thank you, Mike, for your thoughts, and thanks to the other panelists today for theirs.

You asked how I became involved with this. On September 11th, when we saw the second tower get hit, I had a window on the seventh floor of Longworth House Office Building. We overlooked the Pentagon and national airport. And I asked my staff to come into the room. I said, look, if they hit D.C.—or if they hit New York, they are probably going to hit D.C. I would do it if I were them. And I said, we can see—we can see the airport. We will be the first people to see what might happen, and it is our obligation to warn people if it does. And we planned what would happen if we saw something.

I went back to my office. Less than 5 minutes later, the event happened. We saw the fireball emerge from the Pentagon, and we executed a plan in which the male members of my staff ran floor to floor telling everybody, you got to get out of this building, another plane could be coming easily, because we just saw something.

But as I ran through the building, in a surreal moment, I said, what happens if they kill us? What happens to this institution? What are we going to do? So my first order of business, get my staff out of the building, get other people's staff out of the building. Got home, took some preparatory measures.

And then all night I spent the time trying to read the Constitution, read the House rules, et cetera. And I have been doing this for 20 years now—for 20 years—trying to say, we are not prepared. And we still aren't.

And let me just bring it to this moment today. It is appropriate that we are here today on April 6, and the reason that is appropriate is one of the central issues at stake here is what constitutes a quorum.

It happens that April 6 was when the first Senate and House convened. They tried to convene on March 4. They tried to convene on March 5. They couldn't do it, and they couldn't do it because they lacked the quorum.

They didn't say, we are going to lower the provisional Member of the House to chosen, sworn, living, and present. They said, we don't have half the people here, we can't meet legitimately. And they waited till April 6, the same day we are here today. So when we talk about losing the legitimacy of a quorum, it is a real deal.

On top of that, there is this question of, must we always have procedures in place now that we have had forever, and will those continue to work? The short answer is that this commission and the prior commission studied this in great detail. And by the way, both commissions did not start—neither commission started and said, what we really must do is amend the Constitution. They all said, as Vice Chair Timmons pointed out, what is the problem stated.

And Vice Chairman Timmons, you hit the nail on the head, as did the chairman. We have not only got the issue is the quorum valid, but we have got an issue of legitimacy.

If the balance of power changes, and as Mr. Bishop pointed out, by a significant number that you now have a different majority than the people elected through either happenstance, a train wreck, as the Republican Conference experienced on their way to their retreat a while back, a plane wreck, as Mr. Kilmer knows, oftentimes that westbound flight has the entire Washington delegation on it.

One of the issues of legitimacy in a representative government is do you have a representative? Is someone there to uphold your interest? And if your delegation has been eliminated, the legitimacy of representative government is lost.

So when we—I will summarize and close with this. When we first started this, it was all about catastrophic losses. More recent events have convinced me that we have to look at the legitimacy of the institution. And if your State has no Senators or no Representatives at a time of national crisis, you are not part of that representative government. We need to fix that.

This commission has recommended, as did the prior commission, a mechanism that is elegant, efficient, would obviate concerns about the quorum, would obviate the concerns that Mr. Lewis pointed out earlier about how fast can we hold an election, would make sure that every person in every district in every State has representation.

And last but not least is this vision: Imagine a scenario, a horrible scenario, in which the Capitol gets hit during the State of the Union or the inauguration. We have lost the President and Vice

President. We know the scenario. We have lost the House and the Senate and, by the way, the Supreme Court. What do we do?

The provisions this commission has recommended would allow this body, the House and the Senate—if the Senate takes comparable action at some point—to reconvene 24 hours after the most abusive and destructive strike in the history of the country. Twenty-four hours later, the Congress of the United States, Article I, is back and functioning with credible people chosen by the last person elected to represent the people. And they get back to business.

It is a powerful message to our people and to our adversaries and to the free world, which would look to us at that time of chaos and say, my God, what happens now? We have an answer if we enact the proposal recommended by this committee.

Thanks for letting me speak.

The CHAIRMAN. Thanks very much.

I am going to put a hold on my other 999 questions and kick it to Vice Chair Timmons.

Mr. TIMMONS. Thank you, Mr. Chairman.

So, again, what are the problems? We got policy problems and we got legal problems. The policy problems are, do we think it is appropriate if a certain number of members of the majority were to meet an untimely demise, that there is a motion to vacate the chair, and balance of power shifts for 100 to 150 days? That is just a policy problem. The world is going to go on.

The next is if, worst-case scenario, State of the Union attack, 30 Members of the House elect a Speaker. That Speaker becomes Acting President. That is a policy problem. There is a legal problem surrounding it, but that is a policy problem. We probably don't think that is a good idea.

But the legal challenge is this: If the Speaker that is elected by 30 Members of Congress tries to become Acting President, and the designated survivor of the opposing party says uh-uh, and then they say that you don't have a quorum, or you have the impeachment question, and the Acting President—the designated survivor says there is no quorum. So that is a legal question which would create a crisis in government if this quorum issue isn't settled.

So I guess the question is, for true continuity of Congress, continuity of government—and I am going to ask Mr. Rogers this—if on April 26, when we come back, we have a quorum call, and keep in mind there is only 433 Members currently serving in Congress—two passed away—and 217 Members of Congress, press the present button, is that a quorum?

Mr. ROGERS. No [inaudible].

Mr. TIMMONS. Okay. So 217 out of the 433, which is less than half of 435, would constitute a quorum because two Members have passed away, and we are going off 433?

Mr. ROGERS. Well, if the Speaker [inaudible].

Mr. TIMMONS. Okay. Mr. Culvahouse, what do you think about that question?

Mr. CULVAHOUSE. No.

Mr. TIMMONS. Secretary Shalala?

Mr. Baird? Congressman Baird? No? Okay.

Mr. BAIRD. No.

Mr. TIMMONS. So can we get an answer? How do we answer this question absent the constitutional amendment which will take forever? Is there a way to answer this question? Because really that is the question. If we can get an answer to that question, everything else is just a policy issue. It is not a continuity of Congress issue.

So is there any way that we could get an answer, I guess from the Supreme Court, as to whether 217 Members of a 433-Member body constitutes a quorum?

Yes, Congressman Baird.

Mr. BAIRD. Mr. Chairman, I respect the line of questioning. I think it is important. The current rule takes it to a much different level than what you are asserting. And as you said earlier, the current rule would allow three Members or two Members, that is the rule of the House.

It is impossible to imagine that the Framers of the Constitution intended that a House rule could allow three Members out of 435 to declare themselves a Congress, elect one of the Members as Speaker, and then deem that Speaker the President of the United States under the——

Mr. TIMMONS. But, Congressman, we literally could do this on April 26.

Mr. BAIRD. What is that?

Mr. TIMMONS. We could—217 people could vote President and—I mean, that could happen. And is there any way that we would then be able to get an answer to this question?

Mr. BAIRD. You could—you could——

Mr. TIMMONS. Mr. Rogers?

Mr. ROGERS. If I understood your hypothetical, two Members have passed away?

Mr. TIMMONS. Two Members have passed away, so there is 433 Members. 217 is less—was less than half of 435, so it is half.

Mr. ROGERS. Clause 6 of rule XX, when those two Members passed away, the Speaker takes cognition of that, the whole number of the House drops from 435 to 433. You have 217 Members who——

Mr. TIMMONS. Sure. Could you make an opposite argument to that? If you were advising the designated survivor in the worst—case scenario, and the incoming Speaker of the House was in the opposing party, and you really thought it was—I mean, you could make the opposing argument, I would imagine.

Mr. ROGERS. [Inaudible.]

Mr. TIMMONS. And you would if you were advising the designated survivor against the incoming Speaker.

Anyways, so I just want to throw out the idea of, if there is a way we can get this question answered, where the four of you agree—go ahead. Yes, sir?

Mr. ROGERS. [Inaudible] you go on down a list. Actually it is something the committee would look at. I believe the Secretary of the Committee on Homeland Security, who obviously has visibility into things when we are in a time of crisis, is below, I believe, the Secretary of Agriculture. You know——

Mr. TIMMONS. Sure.

Mr. ROGERS. [Inaudible] so the answer right now would be a question of law that the elected Speaker —

The CHAIRMAN. Sorry. Can you make sure your mike is on? Sorry.

Mr. ROGERS. My apologies. I am a rookie at testifying. So I—

Mr. TIMMONS. But, again, the designated survivor would be the Acting President until the rump Congress, the 30 Members create a new Speaker. That Speaker would, under the 25th Amendment, go in above them, and then you have chaos.

Anyways, I think we get the quorum question, and if we can get an answer to that question somehow, it will resolve the legal issues, not the policy issues.

Last question really quick. Mr. Rogers, could the House adopt a rule limiting the ability for a motion to vacate the chair for a limited time under limited circumstances?

Mr. ROGERS. Well, we used to say at the Rules Committee that if you have a majority, you can do just about anything.

Mr. TIMMONS. But could the majority—but could the majority limit the minority's ability under—if the majority no longer has a majority because people passed away, could the majority limit for 150 days the minority's ability to do a motion to vacate the chair through the House rules?

Mr. ROGERS. Well, you would have to pass the rule. So you would have to have a majority of those Members present to vote for it.

The question of electing the Speaker is in the Constitution. So the question would be, are you violating the Constitution in some way by postponing the vacate? But the Constitution is—must elect a Speaker. It doesn't talk about vacate. So I think under your hypothetical, it is possible you could do that.

Mr. TIMMONS. Thank you, Mr. Chairman. Sorry for taking so long.

The CHAIRMAN. All right. I have got Mr. Latta, then Mr. Loudermilk, then Mr. Phillips, then Mr. Perlmutter.

Mr. PERLMUTTER. I have just a comment on this—

The CHAIRMAN. Go ahead.

Mr. PERLMUTTER [continuing]. Conversation. Because I think I want to help Mr. Rogers here. The way it would work—and this sort of ties Mr. Baird and Mr. Rogers together. The way it works is, so, for instance, I was in the chair. I said, based on the deaths, and we have got three other people out, that the number of the whole House is 430. This is what I said Friday, okay? And so then that is the base number. But then what happens—and so that—you work off of that number, except now we have had the catastrophe, and the catastrophe changes that number because everybody's gone or a certain number are gone.

So it isn't like—so then you go to the rule that we have in place as to how do you deal with a catastrophe. So it isn't, the 217 isn't legal or not legal or constitutional. It is what happens once the crisis hits, changes the number from what the whole House number was, 430, now it is 30.

Mr. TIMMONS. But the three of them disagree with whether 217 Members constitute a quorum on April—look—200—

Mr. PERLMUTTER. I am with Mr. Rogers on this one.

Mr. TIMMONS. Okay. But I am just saying, I mean, yeah, I get—that is the problem, people disagree.

Mr. LATTI. Well, thanks very much. And I want to thank our witnesses for being here.

And of all of the committee hearings that we have been having on the Modernization of Congress, I think this is the most serious, because, again, it really goes to the fabric of our Constitution and of this House. And so I think when we have these discussions today, it is really important to take in a lot of things into consideration, especially what our Founders wanted and how that Constitution has lasted for this many years.

And, Mr. Rogers, I know in your written statement, you know, you go back to the Constitution Convention 1787, and I am a historian by training, and it is what I read all the time. And I think that, you know, a couple of the quotes that you have in here, especially with Madison—and, again, Madison was one of the most prepared persons that ever went to probably the Constitutional Convention. Where elections end, tyranny begins.

And you also quote Mason. The people will be represented. They ought, therefore, to choose their representatives.

I think, you know, again, they went through, in a 4—month period of time, for those that stuck it out in Rhode Island, that never even showed up, that they went back and forth to give us what we have today. And I think that, you know, the Founders really gave us something that we have to make sure we preserve.

But I think—you know, I would like to get your thoughts on a couple of things to start with, Mr. Rogers, because, again, when you talk about, you know, the War of 1812, on August 20, 1814, when Admiral Cockburn stood upon the Speaker's chair of the House of Representatives and said, Shall this harbor of Yankee democracy be burned? He led his troops all said aye, and they set fire to the Capitol.

But, you know, it was right after that, then, did our Congress, you know, just end up not coming back to Washington? No, they went to the Blodgett Hotel and met.

And not long after that, in 1815 to 1819 when they built the old brick Capitol, you know, we met. It wasn't that they said, we were going to, you know, have to have a different forum.

And then, you know, you also go in—and I am just going to talk for a couple of seconds more, but, you know, when you look at the Civil War, when you had the southern States leave the Union, and then in 1864, in July, when General Early and the Confederate troops attacked Washington, and Abraham Lincoln went out and actually saw the attack, you know, we didn't see, you know, Washington flee.

But I would just like to get your thoughts on, you know, what our Founders were looking at at that time.

Mr. ROGERS. Well, thank you, Mr. Latta. Yeah, my written testimony goes into it more. I thought it was very interesting, you had a Federalist, the father of the Constitution, Mr. Madison, and an anti-Federalist, who—Mr. Mason, and they agreed, elections. Got to have elections.

And it was thoroughly debated. There were—it came up several times in the Committee of the Whole, and then it came up for the final vote, which I mentioned went 9–2 with one State divided.

So about 16 percent of those voting at the time—or States voting at the time wanted to have appointments, and 75 percent wanted to keep elections.

I think we are in a, you know, an inflection point in our history with all of the—the current pandemic, the violence, all of the other things that are going on. But we have to also look back to the time in which the Founders and each successive group of Members sitting in this great House, they faced some pretty existential threats too.

I am 53. I remember having to shelter under my desk for allegedly what would be good for a nuclear war attack, which I don't think would have helped at all. But in each time that the Congress has faced challenges, they have enshrined the elections. And the people I worked for at the time—Mr. Dreier, Mr. Sensenbrenner, and the House leadership—they wanted to make sure that we had elections. These are mechanisms.

Constitutional amendment, it has some interesting points to it, but it would take time. What would we do in the interim? I think the average time of adopting a constitutional amendment is a fair number of years. So you are still going to have to come up with something to do even if you were to adopt the constitutional amendment.

But the Founders didn't want appointments, and they certainly—you know, at no point did Madison talk about the politically connected picking their successors. In fact, he talked about, he wanted, you know, the wise and the foolish, he wanted the discerning and the undiscerning—the full quote is in my written testimony—because the House has to represent the people.

The great compromise was the Senate is going to represent the States, and the House has to represent the national will, and the way you get there is elections.

Thank you.

Mr. LATTA. Let me ask, Mr. Lewis, if you could have your mike on there. You know, you go through in your testimony really looking at—on the vacancies and also talking really about how you would be fulfilled and at the local level. But, you know, you go through from transportation, to cars running, electricity, to ballot stock being available, you know, how—you know, do we even have a mail service.

And, you know, some points that, you know, if you are thinking about what could happen out there, not just for the people that have to put on the elections locally, but also what could happen here—let's just say something would happen that, well, you know, Washington's obliterated.

Again, where would Congress meet? Do we have to have another place in the country that we would meet? Again, what about telecommunications? You know, I am the ranker on Energy and Commerce's Telecommunications Subcommittee, and we can't even get our own—you know, when we have virtual hearings a lot of times, we can't get our mikes to work. And so the question is, you know, would people be fairly represented there?

What if roads, what if bridges, what if all the bridges that would cross the Mississippi to Missouri, and Mike up in Michigan, you know, what happens if the bridge is destroyed, that you can't get from the upper to the lower part of Michigan?

That, you know, if we have a situation that air travel is stopped, if we had an electromagnetic pulse that would prevent things.

But, you know, Mr. Lewis, you know, in your testimony, you know, you talk about all these things. Could you conduct—could you conduct an election in a situation like that, to try to then say, this is how we are going to get people in? And how would you also have fairness if one part of the country could actually do an election but the other part couldn't?

Mr. LEWIS. Well, of course, your last question is one that is a policy question that I think you guys as policymakers are going to have to answer.

But from our standpoint, are you asking if we can conduct an election? Well, one, I guess that presupposes that society is in such a condition that some of it works, some parts of it work, even if all of it doesn't work.

We can adapt to pretty much anything that is thrown at us, I think. We may not be able to do it on the timetable that some folks have asked, because elections officials are going to be just like the general public. If there is no way for us to get around, if there is no way for us to have communications, it is going to be very tough for us to do the job.

Now, having said that, remember that America, during the time of the Founders, as you all are talking about, was a very rural society and very far apart, and people would travel for days by horse or mule to get in to the local polling place and, in many instances, vote by hand.

If we got to that point, we can duplicate that, we can replicate that. Hopefully, that is not the situation. But I think in our case, as elections administrators, what we have to plan on is the worst possible scenario and then work up from that as to how we do anything else.

And so the answer is, even if we don't have electricity, we can probably still have an election. But it will be very different from the kind that we have had before, and participation by wide segments of the populous are going to be more difficult.

Mr. LATTA. All right. I thank you very much for your answer.

Mr. Chairman, just indulge me for one last—

This is from the National Journal from March the 17th, the first paragraph: Ukrainian lawmakers still showing up to vote. As fighting intensified around the suburbs of Ukraine's capital of Kyiv, entire neighborhoods reduced to rubble, over 300 of the country's parliamentarians gathered in the city to vote.

I yield back.

The CHAIRMAN. I want to give Mr. Baird a chance to swing at that first question, but first can I—Mr. Lewis, I couldn't tell from your written testimony how fast you could actually do—like barring the electromagnetic pulse and the roads all caving in and all of that, if everything is fine, how fast can—you know, in your testimony it referenced 75 days. The law says, I think, 49 days. What—if everything is hunky-dory, you still have to get nominees, you still

have to print ballots, you still have to make sure military voters get their ballots.

Can you ballpark a number with all of the caveats set aside?

Mr. LEWIS. Realistically, what I think we have said before and what we have said consistently, the closer you get us to 60 days or more—

The CHAIRMAN. 60 days.

Mr. LEWIS [continuing]. You then have an election that looks like an election and what most people in America would interpret as an election because you have got enough time to talk about it and find out how to get your candidates and that sort of thing.

At the same time, even that—for instance, let me take just one little piece, ballot stock. Ballot stock is very specialized. It is not just plain paper. It is something we number so that we can account for all of it. On a short-note basis, we are unlikely to be able to produce enough ballot stock. So what we would have to do is do a workaround and do plain paper, but that is so difficult to then prove that it wasn't manipulated. You just sort of have to accept some things as you go through this.

The CHAIRMAN. Gotcha. Thank you.

Mr. Baird, do you want to quickly just reference? And then I am going to call on Mr. Phillips because I know he has got to go to another committee, and then I will go back to Mr. Loudermilk.

Thank you for your flexibility.

Mr. BAIRD. Thanks, Mr. Chairman.

A couple of things. One, I have submitted extensive written testimony, and I would encourage the committee to review that. Also I'll be responding to Mr. Lewis's testimony.

But I want to address something—I am sorry he is not here, but Mr. Latta raised. The quote actually—first of all, we all agree that under normal circumstances elections are the way to choose your Representative. We all agree to that. But if you can't have an election because it is unsafe to do so, or because it takes too long, it is also important to still have representation as important decisions are made.

So the question is not either elections or no elections. Nobody on this committee is saying do away with elections. We are saying have a replacement temporarily until such time as elections can be held, as, Mr. Lewis points out.

With regard to the Madison quote, history is important. The quote as cited is not correct. The actual quote was not when elections end, tyranny begins. It was when annual elections begin.

Madison—we don't know if it was Madison or Hamilton. At least Wikipedia says it was Madison. The Library of Congress says it could be Madison or Hamilton. But here is the point: Madison was arguing in that phrase about should we have annual elections, biennial elections, et cetera. And he actually said, Isn't it interesting how Proverbs-like when annual elections end, tyranny begins could get used out of context, which they are in this case.

Now, a couple of other quick points. Look, it is not fair to say, or accurate to say that the Framers only accepted elections, direct elections as valid means of representation. The United States Senate, for 125 years, was not directly elected. The Framers accepted that. Beyond that, the 17th Amendment which vested the power to

choose Senators in the hands of the people still allowed non-direct replacement via Governors, which I think is unwise and we ought to change. But there are plenty of precedents in our own history, including the existence of the Senate itself.

One other thing, Mr. Timmons is from South Carolina. Your State actually has enacted a very similar provision to that which the Commission is recommending. The National Council of State Legislatures has reviewed extensively succession provisions in the State legislatures, and you will find that a number of actually fairly conservative States have language almost identical to what we have got; that upon the election of a Representative in the State, the Representative shall choose a list of successors. In the event of significant losses, from that list the replacements will be made.

That exists in South Carolina as a matter of fact. So if we are saying that only elections are valid for representation or you have tyranny, then the United States Senate is a tyrannical organization—sometimes we feel that way, I know—and we are also saying the State legislatures are tyrannical. It is just not a fair and valid comparison.

The CHAIRMAN. Go ahead, Mr. Phillips, and then I have got you, Mr. Loudermilk.

Mr. PHILLIPS. Thank you, Mr. Chairman.

This hearing is a great reminder that we overindulge in retrospect in this institution and not nearly enough in prospect, and I am grateful for this.

You know, in my estimation, continuity requires both people, place, and process, and we are appropriately focusing on people, but particularly Members. But I do want to call attention to the fact that this place would not operate without extraordinary staff and house officers, parliamentarians, et cetera.

Also process, you know, let's say we did proceed with selective replacements based on current Members. I know how hard it is in my second term to understand how this place operates. I cannot imagine being a new delegate going to a place where you are completely unaware of process or parliamentary procedure.

And also place, you know, where would we retreat to? Would it be military base perhaps?

So I would just ask that maybe we spend a few moments—I would like to hear all of your thoughts on this subject. How micro should we get? How detailed should a plan be relative particularly to process, explanation of rules, how a Congress would communicate if it is no longer in Washington, assuming Washington is non-inhabitable, for example, and also, again, the support teams that make this place operate.

Maybe, Mr. Baird, if you want to start.

Mr. BAIRD. Thank you.

You are exactly right. In my own testimony, written testimony, we have to find a way to have continuity of staff.

I would also just quickly say part of the advantage of Member-designated replacements is you will get a lot of people in that replacement position who have already served in Congress. In my case I would select former Congressman Don Bonker. He was two predecessors away, same party, centrist Democrat, knows the district inside and out, super smart. You would have me, I am dead.

Sorry. But you have somebody just as good as me and who understands the institution. Not everybody would be chosen that way. But you would have a critical mass. And if you pair that with some continuity of staff and, as you said, with procedures allowing for remote meeting if the circumstances demanded, you can reconstitute this body in 24 hours.

Mr. CULVAHOUSE. I agree. It needs to be micro, and if you look at the—as I indicated, I served on two Department of Defense Nuclear Command and Control Advisory Committees, and I also served on the President's Foreign Intelligence Advisory Board.

On the executive side, the planning is elaborate. It is micro. It is very detailed. As I—when I met previously informally with the chairman and the ranking member, I indicated—and it's really all I can say—I can say I served as an exercise president once, and I was very impressed on the executive side at the level of detail. When you turn to the rest of the government, not so much, not so much.

And I do think, in addition to fixing this quorum problem, which I firmly believe and every lawyer that serves on our committee agrees that is a serious problem, I would encourage you to consider extensive planning. I mean, we worried about the bolt on the blue. When I was in the Reagan White House, I was in the second helicopter. I don't think I would have made it probably, but all we cared was that the President got out and the Vice President. But I do think we need to have a resilient government. That is a matter of deterrence. It is a matter of deterrence, and we have Mr. Putin not disclaiming nuclear weapons, and so we are back to where we were in 1987, I am afraid to say, and work needs to be done.

Ms. SHALALA. I agree with my colleagues. The problem that we are having trouble with is how do you get replacements, because the election people tell us it will take too long to set up an election. That is a technology problem. That is an investment problem. And States have solved this problem. Oregon does it by sending out ballots. I mean, there are ways of dealing with the technology problem with investments.

None of us believe that we should have anything other than elected Representatives, and that anything we do should be temporary to pull the government together, but we also don't want to change the mix that the people elected. We don't want to shift from one party to another just because a certain party lost more Members.

So overlying all of this was our desire to keep the political mix, which made it more complicated, obviously. But we really believe in elected Representatives. Temporary replacements, it seems to me, we can deal with, and we can certainly deal with the technology and the difficulty of a quicker election with more representation.

Mr. PHILLIPS. I wholeheartedly agree.

You know, my concern is, even with great people, without a knowledge of process, any institutional memory, place, any of that—without that predetermined and somewhat prepared for, I am afraid even the best mechanism by which we replace people still might not be satisfactory.

Ms. SHALALA. Well, most of the—I mean, Brian identified who he would have replaced.

Mr. PHILLIPS. Yeah.

Ms. SHALALA. Most of us would have replaced someone with legislative experience of some kind or another. I mean, I don't think it took me that long to figure out the process.

Mr. PHILLIPS. And that is part of my question, is should we have maybe some standards by which these, you know, successor—

Ms. SHALALA. We certainly could do some orientation. We certainly could do some quick orientation.

Mr. PHILLIPS. And maybe pre-orientation, you know, prospective orientation.

Ms. SHALALA. Yes, there is no question about that. But those are all the details.

And, finally, I want to comment on the organization of the government. The agencies have detailed plans that they exercise. They go through exercises all the time.

Mr. ROGERS. Thank you for the question.

When I was at the Rules Committee and we were dealing with the continuity, we participated in annuity exercises. We went to a remote location. We had procedures. The rules, the precedents, and everything were backed up on very hard and mirrored sites that are located far away from Washington, D.C.

So I think perhaps the Select Committee could do some inquiry and see where those things are at now. That was 17 years ago when we did those sort of exercises and processes.

I certainly agree the need for staff—of course, the original Congress didn't really have staff. I think they had a clerk. And as a staffer, I understand that role and agree with it.

A couple of other quick points. You know, it might be that the immediate area of this building or the Capitol is damaged, destroyed, whatever. But they did put as a consequence of the Cox-Frost Task Force the ability of the Speaker to convene in another place within the seat of government. The seat of government is kind of an interesting term they chose. I don't know, Walter Reed Hospital might be seat of government, or someplace else. And certainly, I think Mr. Latta mentioned that they moved to the hotel when they had to during 1812. But I think you could be pretty generous about where you moved the seat of government to. Of course it involves transportation issues and other things, but—

Ms. SHALALA. Go back to Philadelphia.

Mr. ROGERS. Go back to Philadelphia.

A couple of other points. One, you could have a situation with a lot of Members incapacitated but able to vote. They just couldn't come and do it on the floor. So the committee might want to look at something like the Sergeant at Arms being sent out to canvass the vote, you know, some sort of certification. Let's say, God forbid, that a bunch of people are in Walter Reed because of some horrible event, but they are still—you know, incapacitation doesn't necessarily mean coma. I think that is what they thought of in 2004 or 2005, but you could have something like that, so some sort of canvassing by an official agent of the House.

And then the last point is I have put together some thoughts about what happens if all of the Members are killed or all are inca-

pacitated, and it kind of draws on the constitutional amendment idea but without changing the elected nature of the House.

What it would be, if I can just briefly mention it, is, so, the House chooses its officers. You elect the Clerk. The Clerk presides over the House until the new Members are sworn in and the rules are adopted. The Speaker, as everyone knows, doesn't have to be a Member of Congress but has the ability to vote.

So drawing kind of on those two principles, an idea that a person some of you may know, long service to the House, Billy Pitts, he was staff director of the Rules Committee, he was a minority officer of the House, and several other things for Bob Michel. He and I kicked around some ideas, and the idea in brief would be that the States could elect two continuity officers each. They don't come to Washington—I mean, they come to Washington for orientation and training and all the things you correctly point out, but they stay out in the States. They are the continuity officers that are duly elected by the people. Each Congress, the Congress could decide, because it has the power of deciding who actually gets seated, so you could also have a vote on opening day: This slate of people created by all the States are our continuity officers. Two could be from different parties, same party, but allow each State to decide. And then what you have there is officers who could come and could act in the stead of Members, could vote, could do other things.

I still—I mean, I immensely respect the work of the Commission and the people here. I still have a really hard time with the idea that—and I have a hard time based on what I have read of the Constitution and the Federal Conventions and whatnot, the idea that you are elected to the House and take the oath and, therefore, you are a Member, and then you have somehow sort of a property interest that you could convey to someone else, which is sort of the idea of I have in my back pocket my successor.

Some people talk about a durable power of attorney or some other mechanisms, but that to me is not how our Nation was founded. That sounds a lot more like aristocracy.

But thank you.

Mr. PHILLIPS. Thank you, sir.

I yield back now. Thank you.

The CHAIRMAN. Mr. Loudermilk.

Mr. LOUDERMILK. Thank you, Mr. Chair, Mr. Ranking Member, for allowing non committee members to participate in this. This is very intriguing and something I would like to follow this process even further.

But as a member of House Administration, we are invited to come in and listen because this is somewhat dealing with elections. And this isn't the direction of the questions I was going to give, but something Mr. Phillips brought up prompted a question.

Especially when it comes to a temporary solution, I look at the idea of having a designee, designated-successor type thing. I can also see several problems with that, that that becomes a political tool for the next election when you decide to leave that this is: I was already selected by so and so. Therefore, I have got an endorsement. I could also see a situation where that puts additional stress on a Member because there will be campaigns to become that designated person, right?

But I have got one fundamental question, because I am intrigued, that as I try to do quite often, this committee is going back and looking at the original intent of the Constitution. And I think, inevitably, if we come up with a solution, it has to be consistent with that original intent or this whole thing gets caught up in questions in—you know, throughout the future with Supreme Court and everyone else.

So real quick question. Mr. Rogers, maybe you are the one to answer this. The Constitution clearly says that the House of Representatives shall be composed of Members chosen every second year by the people of the several States. So that is election.

Would a temporary replacement constitutionally even have the authority to act as a Member of Congress under the Constitution because they were not selected by the people of the State?

Mr. ROGERS. That is an excellent question, Mr. Loudermilk.

And, again, not to keep going back to this idea, but the idea of continuity officers that we came up with in preparation of the hearing is they would be elected in the States, so they would have some imprimatur of the election.

Mr. LOUDERMILK. Okay. And someone else have a—oh, yeah.

Mr. CULVAHOUSE. Congressman, I mean, the answer is no, but we are proposing a constitutional amendment.

Mr. LOUDERMILK. Okay.

Mr. CULVAHOUSE. So the constitutional amendment would empower that successor, just like the temporary appointments on the Senate side.

Mr. LOUDERMILK. Yeah.

Mr. CULVAHOUSE. Now, the one point that I think is important to make is the Framers obviously created the House with only elected Representatives, did not empower for temporary appointments. And Brian eloquently—but the one thing that the Framers were very clear about and the one reason that I think every lawyer who has looked at this comes down on the side of it is the majority of the whole House is the quorum, it is the Framers disliked intentionally the idea that a rump group of the House, a handful would purport to be the House of Representatives. And that is partly because there was a lot of jealousy and distrust amongst the early States. Rhode Island and Maine was afraid that the larger States would act inappropriately—or act not in their interest, I guess, is a better way to say it.

But, you know, I remember my first job out of law school, I was working for Howard Baker on the Senate staff, and there were a number of old lions of the Senate—and they were old lions—who were distrust—you know, who still didn't like the fact that Gerald Ford was going to be confirmed to be Vice President because that was inconsistent with the Framers. But it was—you know, we are fortunate that that happened.

And I think here the most—the least Representatives, the least Representatives' scenario that you can envision is that you have 30 House Members after a nuclear attack, or a weapons attack that purports to act as the House.

Mr. BAIRD. Congressman, you raise a really interesting point, and it is a difficult challenge. Clearly, the Framers wanted there to be direct elections in the House, but they also wanted there to

be representation in the House. If you have no representative at all—what we are left with is kind of a paradoxical situation, we are saying having no representative at all is somehow better representation than having a representative chosen on your behalf temporarily by the last person you elected, which is what we propose.

Mr. LOUDERMILK. Right.

Mr. BAIRD. There is a debate about, discussion that has been said a lot, Well, you can't pass a constitutional amendment rapid. Actually, you can. There is nothing in the Constitution that says you can't. It is in the best interest of the States to ratify quickly if this body will act. Why? Because then every State is assured that even in catastrophic circumstances, they will have temporary replacement and have a voice in that Congress in the Article I branch until they can have direct elections. So we could do it quickly, we could ratify quickly, and you would have representation.

Mr. LOUDERMILK. One of the things that I heard discussed—this—I love the thinking outside the box. And we talked about that there were originally appointments made to the Senate by the State legislatures. The design of the Senate and the House were specifically different during the time. The State legislatures represented the interests of the State, and the House, the people. So it kind of eliminates that in my mind.

The other thing is the only way that I see constitutionally you could do this is—what you are talking about is electing a vice Congressman is really kind of where you are going with it, right, sort of like the Vice President, somebody to accede to it.

Politically I can see a lot of issues with that. A lot of Members may decide to have a family member. I mean, you think of the districts out there and how polarized we are right now, and I would double my security, you know, if there was somebody who could immediately accede to that position.

But one of the things I am looking at is I don't believe there is a silver-bullet solution to most issues, and I think this is one that a multiple approach is one to look at. And as I am looking at it is, what is—what can we do to reduce the time that you do something temporary? If you can significantly reduce that time, then to convene a House of Representatives that is duly elected.

Georgia, the State of Georgia, has actually addressed this in code. In its current code in Georgia, basically it says if there is a vacancy of more than 100 in the Federal House of Representatives, then the Governor has to issue a special election to occur within 49 days.

So they have actually addressed this, said, look—they want to make sure that, you know, we have representation for the State of Georgia, and that is triggered at 100, and it is only for special election if a Georgian member of the House has deceased as part of that or is incapacitated.

So if there is a way that we could get 50 States to enact a similar type—you know, a bill and to make it law of the State, then that would significantly reduce the potential time that we have temporary.

Yes, sir.

Mr. ROGERS. Mr. Loudermilk, the Continuity and Representation Act that was passed in 2004 and 2005 is Federal law and requires

exactly what Georgia did, a special election in 49 days if 100 or more Members are killed.

With due respect to the States and their power, it is probably a very good idea for each State to enact their own State law because of their power on elections. But there is a Federal law that requires that.

Mr. LOUDERMILK. Okay. And that is good to know. I do agree with you it should be done in every State because then that prompts the State to be prepared, you know, in that event. And so—

Yes, sir.

Mr. BAIRD. Two very quick points. One, this Commission and prior commissions have addressed that very question of the politicization of their appointments. The better strategy, from a security and political perspective, is keep it quiet, keep it secret so that there is not some currying of favor. If people like me, they don't like A.B., but he would be my designated successor, I don't want that baggage.

Mr. LOUDERMILK. Right.

Mr. BAIRD. And I don't want A.B. to be a target as well.

The second issue is, though—first of all, there is a real question of could we have meaningful elections in 49 days. Since that bill was passed, there have been very few special elections conducted in that time frame. But the second point is, a lot gets done in 49 days. After September 11th, this body convened. I was there. We did—we modified FISA. We authorized the use of force in Afghanistan and elsewhere. We did a lot of stuff in 49 days.

So when you most need the Congress, you wouldn't have a Congress for a time that is just a crucial period.

Mr. LOUDERMILK. Right. And I agree that as—when we do go back and compare the founding of our Nation, they weren't under the same timeline that we are now. You know, if there was going to be an attack, you had weeks to prepare for the ships to sail across the Atlantic, right? We are talking from months to minutes now. And so I understand the need to do this.

And so, like I said, it is a very intriguing conversation that we have to have. And so thank you, Mr. Chairman.

The CHAIRMAN. Thanks.

I have got Mr. Perlmutter and then Mr. Davis.

Mr. PERLMUTTER. This is a really important topic and one that has all sorts of paths that he we could follow. But I am with Mr. Baird and the Commission. I just don't think we can have any lapse of time. Okay. In that instance then we have got to have something that covers us in that 49-day period and then have the elections and then, you know, move forward. But in that momentary lapse, we have got problems, especially if it has been an attack, especially if it has been, you know, where—with things going on.

So I agree with Mr. Rogers on, you know, the quorum piece of this thing, but I don't agree with him—I mean, I think the Constitution is flexible enough for us to be able to do a number of things. I am very concerned—I agree with you, too, on how long it will take to do a constitutional amendment. We have got to manage this in the time—I mean, right now.

So—and I think rules change, but it says—so Article I, Section 5, 5.1: Each House shall be the judge of the election returns and qualifications of its own Members and a majority of each shall constitute a quorum to do business.

So there it sort of comes back to your question about what is a quorum, but I think we—you get then to the next section, 5.2: Each House may determine the rules of its proceedings. So where I think we have failed—or not failed, but I think we have taken a policy that I don't think fulfills all that we want is when we say, you know, let's look at the number of people who—and Ms. Van Duyne wants to make a distinction—I think she is right—between incapacitated and dead, so we have got to think about that.

But I think we need to allow—so let's say there is 435 of us, and 435 is not a sacred number. We have had different numbers of the whole House since the beginning. Initially, each of us represented about 30,000 people. Now we represent about 800,000 people, so that number is not sacred.

But if we start at 435 and let's say 400 people are killed, now we have 30. What's the policy? Do we just let the executive go forward, do its thing? Is Congress going to be able to function, not function?

Mr. Rogers.

Mr. ROGERS. Well, thank you, sir.

I do take a little exception with one of the other witnesses here who said no constitutional scholars had found for the provisional quorum rule. Walter Dellinger who argued *Raines v. Byrd*, which is a case of constitutional standing about the line-item veto and did many other cases, he testified that the quorum rule would work under the Constitution. And the point of view of the then Parliamentarian, Charlie Johnson, and the Members I worked for and Mr. Dellinger was to have some elected Members, even if it is a small number, is better than any.

Mr. PERLMUTTER. I am actually agreeing with you. I just don't think it goes far enough. It doesn't fulfill the policy concerns that I am worried about.

So I think that the House had the right to change its rules. I think the Supreme Court has to respect that, but I don't think it really covers—it then lends us to these problems of, okay, the majority just switches, you know, who is the Speaker, all that kind of stuff. And I don't think it is helpful when you get down into that nitty-gritty piece of this thing.

Now, God forbid any of this stuff happened to us. Okay. But I think—so I am not disagreeing specifically with the rule, but I don't think the policy that ultimately comes from it is what I want to see. I want us to be able to cover the losses as quickly as possible in a way that does the least disruption to the makeup of the House, and then provide for the elections, which you are absolutely right, that would then take place 50 or 100 days, or some appropriate amount of time thereafter.

And maybe we make sure that whoever is the designated survivor of the Member—and this may be in your—in the amendment that you all are proposing—can't run for election, you know, and just cut that out, just deal with it, you know, for that momentary period.

So I just think there is enough flexibility for us to do a rule, and you did one. It didn't go as far as I would like to see it go.

Mr. ROGERS. If I could just comment on that. I totally agree with you. I think that the House Rules Committee and the folks on this Select Committee and others should look at all of those rules and continuity procedures. We did what we could in the time, but then, of course, other issues came along and there has been some work over time. But, yeah, it is a very important issue, sir.

Mr. PERLMUTTER. The last thing I would say, because I went with the everybody—is—killed scenario, there is the question of incapacitated comes up and the definition of incapacitated. Is it a coma? Is it—I don't know what it is. That one still has me a little bit troubled.

Mr. Baird, do you have a thought on that?

Mr. BAIRD. Well, the incapacity issue has been wrestled with, as you know, but it is not—I am a neuropsychologist by trade. I have dealt with a lot of capacity—

Mr. PERLMUTTER. I can't—I am not sure if your mic is—

Mr. BAIRD. The light seems to be on.

Mr. PERLMUTTER. Maybe it is just yours is a voice I can't hear.

Mr. BAIRD. I will bring it a little closer. Thank you. Is that better?

Mr. PERLMUTTER. There you go.

Mr. BAIRD. Thank you.

The incapacity issue is not unique, and people have wrestled with incapacity for a long time. The easiest and most eloquent solution is simply if you say you have got capacity, you have got capacity. Okay. So, in other words, somebody is not going to say, I never liked Baird anyway. He's crazy, which is a given. But they can't remove my ability to represent my constituents that way.

So if you can declare you have capacity, you should be acknowledged that. But if you can't declare that, then there should be a process with medical professionals and legal professionals to decide it. But as soon as you then can declare it, you get it back if you are ruled without capacity.

Mr. PERLMUTTER. The last thing I am going to say is for Mr. Bishop, because we were on the field at Gallaudet when you guys were under that attack, and we didn't have any police. We were all huddled in the dugout, you know, wondering what the heck was going on. And so, the very same things that you were—you know, you guys were under an attack. We weren't, but we were wondering if one was coming for us.

And so, you know, we have all—and then, obviously, we have January 6. So, you know, this isn't just hypothetical anymore.

Mr. BAIRD. Mr. Perlmutter, if I could address that real quickly, I'll be very brief on this.

One of the things we have not addressed, but I think is real important to recognize, in our loyalty to elections, which we all believe are important, essential, we create a condition in which without elections, people can alter the makeup of the House and Senate, and that may well be an incentive to do so.

The reality is had 20 Members of the Republican conference been killed that day when Mike and his colleagues narrowly escaped

that fate, the balance of power in the House of Representatives would have changed.

In the United States Senate with an evenly divided—a dead-even divided majority, or minority in the Senate, one assassination, non-electoral process, can change the balance of power in the Senate, and that affects the Supreme Court for a lifetime.

So if we don't find some mechanism to disincentivize non-electoral interventions which could be by foreign terrorists or domestic, we create an incentive for mayhem, and we undermine the very principle of elections which we are saying is so sacrosanct, because through non-elective means, I could change the balance of power in the House and Senate, and that is dangerous.

The CHAIRMAN. I think Mr. Lewis wanted to chime in virtually, and then I have got Mr. Davis.

Mr. LEWIS. As I see this, look, you guys are the policymakers on this, and we are sort of on the end of we will deal with whatever policy you create. But from the discussion that I am hearing here, it seems to me we need to separate two things, because it is not a question of election versus appointment or what have you. It is a question of what do we do for the emergency period before any election is possible? And I think that is what many of you are focusing in on.

But it is not—in my mind, it is not a question of either/or. It is a question of solve the first problem first, which is the emergency situation.

The second problem of how do we do an election and when do we do an election then follows that. And remember this: After 9/11, this country was almost of one mind. It was unreal how our opinions about what things were changed and our divisiveness went away for a period of time. It didn't last forever. But for a period of time, Americans were pretty much of a single mind: We are going to do what we need to do to make this country okay.

And I think in any future disaster, you are going to see a similar reaction for a while.

The CHAIRMAN. Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chair. Great to hear from you.

I don't know if anybody else noted, but my good friend, Mr. Perlmutter, used the word "lastly" three times, so don't—lastly. I would like to begin my questions with Mr. Bishop.

Mr. Bishop, you don't look any better on video than you did the last time I saw you in person.

Mr. BISHOP. I can't—I knew I could just expect that from you. I will just not say anything out of respect.

Mr. DAVIS. Well, hey, you are a changed man if you have got respect for me, my friend.

Hey, it is great to see you. And, you know, we were together that morning on that baseball field, and you and I both share that probably as our most terrifying experience that we ever had in our lifetimes together. We ended up at the same spot at the end of the shooting, and we will forever have that bond together of experiencing that day.

And my question was going to be to you, because I didn't remember our margin of the majority back then, but Congressman Baird just mentioned that if it worked out differently, if David Bailey and

Crystal Griner weren't there, it could have changed the balance of power.

I really appreciate the job that all of you are doing in putting forth proposals, and I agree that this is something that needs to be debated, but I am conflicted just based on the discussion and the testimony that I have heard here today as to what that solution is.

Mike, you were with me that day. You are somebody who I consider a very close friend. I was not here for your opening testimony, so if you mentioned this earlier, I apologize. But what do you think is the best thing that we ought to be considering today? Because if it is the constitutional amendment, I mean, I have got a lot of other great constitutional amendments that I support, but they haven't gone anywhere in decades.

So if that is your number one choice, how realistic are we to actually be able to do something?

Mr. BISHOP. Well, that is a better question for you and your colleagues as to whether or not you are in a good position to do anything and how quickly you can do it, but I guess my point being here and the point of the Commission in producing the recommendation and presenting it to Congress is that if not this, what? We all know that these issues exist. We all know of the imminent threats to our Constitution, our imminent threats to our institutions. And, you know, I think you have to take aggressive, quick action to put in place a mechanism.

And I, unfortunately, don't think it is our luxury to be able to look at the amendment process to the Constitution and say we don't support it because it is going to take too long. We just don't have that luxury. We have got to put this on the track and start it down the path as quickly as possible so that we—you know, we have, at some point in time, a solution in place because we are sitting ducks, to use a very rudimentary expression.

We have done nothing, and we need to be—as was said earlier, we need to be prospective in our approach and not retrospective because what happened to the Republican delegation that day, Barry Loudermilk was just there as well—I don't know if he is still in the hearing room. He was there as well, and I think we can all agree if it can happen to us, it can happen at any time.

And we—former Congressman Baird mentioned that we were also on that train that crashed. Now, I don't know, maybe we are bad luck.

Mr. DAVIS. Yes. Yes, you are.

Mr. BISHOP. Yes. You were there too.

My point is that it can happen, and you just don't know when it is going to happen. It can be a planned attack. It can be absolutely just a tragedy occurrence, but we are—instead of taking forward action, we are frozen in our tracks because we are talking about how long it is going to take.

So the path—the journey of 1,000 miles begins with one step.

Mr. DAVIS. I appreciate you bringing this up as a possible solution.

As the chair—as the ranking member of House Administration, my concern is how—is election administration. We have had provisions in place that were implemented before most of us got to Congress that provide for an election within 49 days, right?

The CHAIRMAN. 49 days unless there is a previously scheduled election within 75 days, and then it goes to the 75.

Mr. DAVIS. So election administration. Donna, great to see you again.

You mentioned mail-in ballots, you know, States like Oregon put forth. In a time of disaster and a time of war and a time of attack, I don't necessarily trust the Post Office is going to get those ballots out as effectively as they do in a time of peace.

I would argue States like Florida probably have a really good local election administrative process that could work, and I guess my goal, in the short term, is we talk about the time it may take to implement any agreed-to solution that we may have, is how do we ensure that those elections can go off without a hitch? Why aren't we replanning election administration as part of this issue too, as part of this discussion? What do we need to have in place through the Election Assistance Commission, through HAVA investments in our States to be able to be ready for any possible short-term election process?

I mean, Alaska is going to go through an election process for a special election for our friend and former colleague, Don Young. And I have been to Alaska, and let me tell you, the election administration processes in Alaska are a lot different than any other State I see represented around this table today.

So planning for that election process, is that something you have thought of, Donna?

Ms. SHALALA. Obviously, that is a key part of this. All we are trying to do is preserve the status quo. This is the most conservative approach you can have. What we are interested in is protecting the balance of power, covering the losses with the least disruption as quickly as possible. Those are the principles that we are trying to follow, and to do that, we need an election process that is quicker and fairer and perceived as fairer. But if we don't do that, we end up with small quorums without representation across the country.

So that is, obviously, a critical part. They need to do continuity of government planning as well, and Congress needs to look at the resources that are needed to keep—to get that—really to take advantage of technology and of other things. And I am not arguing particularly for mail-in ballots or anything else.

Mr. DAVIS. Right. No, I understand that.

Ms. SHALALA. I am saying for the period of time. And all of us want this to be temporary so that we have representation, and we can continue the government, but we also believe in tighter elections.

Mr. DAVIS. I am going to make some comments lastly. I promise you, this will be the last time I use the word "lastly" in this hearing.

I think we all have the same goal. We want something in place in case of that disaster. What it is I think should be a layered approach that this committee should look at, that would include election administration, would include long-term whatever—whatever was decided upon the best process for continuity.

But I think what makes this House special is that we don't have anyone appointed as our successors. We are the ones that have spe-

cial elections. The Senate, based upon each individual State's laws, has a different process. So we have to take that into consideration constitutionally. It is what our Forefathers imagined.

Now, I do believe precedents have been set in a time of war, in a time of disaster. The executive branch, they don't need Congress now to begin a conflict of retribution and retaliation. They certainly wouldn't need it if Congress was incapacitated for a short term.

However, I am glad we are having this debate because I do believe, based upon the numbers that Congressman Baird laid out, that if there were vacancies in Illinois's 13th District, in Georgia's district, and in Michigan's district, among others, with a different outcome on June 14 of 2017, I believe the constitutional crisis would have been that we would have seen the minority in the House want to immediately become the majority.

That is something that is—you know, I hadn't thought of until this morning. But it is something that, again, we have to prepare for. I am glad everybody is here working on this issue. I am glad we have got a great team on mod comm and the rest of the committees of jurisdiction.

And I thank each and every one of you lastly.

The CHAIRMAN. All right. I have got Ms. Van Duyne and then Ms. Scanlon.

Ms. VAN DUYNE. All right. And I hate following Rodney because I could never be as short, sweet, or funny, funny as you.

So I appreciate this conversation. I think I am in a unique position being a freshmen, a freshmen who came in in the middle of a pandemic, and a freshmen who came in not ever seeing Congress as a Member, how it normally works.

You know, Ms. Shalala, you use the word "temporary" a number of times. The definition of temporary, the definition of incapacitation, and the definition of emergency I think have been redefined over the last 2 years. I look at the word "temporary" and what we have done with our temporary response to the pandemic, which I appreciate you bringing up, because it is the first time that we have actually brought up the context in which we are having this conversation, the use of proxy voting, the use of remote meetings.

I have been here for almost 15 months. There are Members of this body I have yet to meet. There are Members of this body that do not have open offices for constituents to come into because we are still in an emergency, we are still handling this in a temporary fashion, and it has been over 2 years.

So I would ask what is the problem right here that we are trying to solve? I think right now if it is in a pandemic situation and it is temporary, these solutions that we are discussing I think are way too broad, and have already shown an opportunity to be completely misused.

I also start thinking about the history of our country, where we came from, the pandemics that we have had, the natural disasters that we have had, the wars that we have had at home and abroad, and how we were able to come and do our job. We were able to come and have conversations, meet in committees, be right down the street and talk to one another, and how difficult that has been in the last 2 years.

And yet, our Forefathers were able to get here without such, you know, comforts as planes and, you know, phenomenal car systems and highway systems. We were able to do that then.

And I understand that the threats upon this country and upon this body have definitely changed, but I am also concerned about the lack of transparency and having—you know, keeping in secret who your Representative is going to be to me is problematic. I think when we pick one person to be our replacement, you know, the fact that we have got a 50 percent divorce rate shows that sometimes the person that we pick isn't exactly the person that we think they are going to be.

And I understand these are short term, but, again, short term and temporary have absolutely changed. We have redefined that in the last 2 years.

Mr. Culvahouse, there is definitely still distrust. I live in the State of Texas, and, you know, we have a saying right now because we see so many different transfers coming from one particular State, Don't California my Texas. That is still happening today. We have not been able to move beyond that.

But I would bring to the attention of this committee that we are looking at a number of different recommendations from the board; the first being a mass amount of casualties such that we don't reach a quorum. And I think there are a number of ways that we could, in a temporary position, be able to solve that. And I understand 49 days is the issue, right? I mean, is that what this board is saying? Because this is what all the temporary—and temporary is being defined as 49 days or, in the case that you have got another election already scheduled for 75 days less, then it would be that. Is that the issue we are having is the 49 days is why we are here today?

Mr. CULVAHOUSE. I will go first. No, I don't think so because, I mean, 49 days is a long time in a crisis, right? As Brian talked about all of the things we are doing in the aftermath of 9/11, let's imagine a scenario: You have a nuclear attack, and you have an acting President who may not even be a Cabinet member, who may not even be a Cabinet member, and you have a rump group of—and you have a fewer than—you have, you know, 100 Members of the House surviving, and you have an acting President who wants to surrender the Navy to the Chinese. I am really doing a Tom Clancy kind of thing.

You would expect and hope that the House and the Senate would impeach that President, but that President—and I am doing a lawyer's unimaginable horribles thing, Congresswoman. But having been a White House counsel, that acting President's White House counsel would say there is no House, There is no House. It doesn't have a majority.

Ms. VAN DUYNE. And to your point—

Mr. CULVAHOUSE. And you may not even have a Supreme Court. And so, it is—I think time is of the essence, and that is why—I don't think—our Commission would suggest there should not be any interregnum where there is not a functioning House of Representatives. We believe there should always be a functioning House of Representatives and a functioning Senate.

Ms. VAN DUYNE. Let me ask, Mr. Rogers, I know that you also had your—

Ms. SHALALA. Yeah, let me just add onto that.

We are distinguishing between a pandemic where people are still alive, and if there is a problem with proxy voting, I happen to think when I was here that there was a problem with the proxy voting. We tested it out. We clearly needed to tighten up on that. But there is a distinction between a pandemic and when Members of Congress are actually dead, and their areas don't have representation. That is where we are recommending temporary until there are elections.

Ms. VAN DUYNE. Okay. Because I am looking at recommendation 2 that says: Amend the Constitution to authorize that the House and the Senate shall each have the power to provide for emergency procedures, whereby the bodies would allow remote forms of attendance and participation in the businesses of either the House or Congress subject to the restrictions that, and it gives a number.

So basically I am reading this—and maybe I am misunderstanding, but I am reading this to say we are going to have proxy voting and Zoom meetings constitutionally available at all times.

Mr. BAIRD. That is not the intent.

Ms. VAN DUYNE. Okay.

Mr. BAIRD. The issue is, imagine the House and Senate have adjourned for August recess. You are back in your district. Vladimir Putin says, I am fed up with how things are going in Ukraine. And if you guys intervene in any further way, if you don't stop all arm shipments, I will nuke the Capitol. It might be—

Ms. VAN DUYNE. That is one scenario, but I am also reading into it saying that you are, you know, established by being physically unable. I would argue that there were a number of Members in this body that have said that they are physically unable to be here. And we are allowing each Member to define whether or not, for them, they are able to be here or not, whether or not they consider themselves temporarily incapacitated and immediately can come back when they want.

Mr. BAIRD. With respect, Congresswoman, that is not in the proposal. What is in the proposal is that there may—what we don't want to do is say that you must be physically present in order to be deemed to have capacity because there may be situations where we cannot convene in person. And we need to have mechanisms, i.e. potentially remote voting to deal with that, because there may be situations where it is not allowed.

Capacity means your rational ability to make decisions. That is what capacity in the legal context means. I mean, that was my background was neuropsychology. That is what that capacity means. But if I am laid up because I am having a baby or because I have got cancer and I am getting treatment, I am not incapacitated under any stretch of the law, and my constituents should not lose the representation.

Let me just take it to Texas for just a second.

Imagine that a flight of the Texas delegation is going back home to Texas, and tragedy strikes, or there is a meeting of the Texas—Republican or Democratic parties, and somebody takes that out.

You could lose the representation of the great State of Texas in the House of Representatives for a protracted period of time.

What we are trying to say is we want to protect Texans' right to have representation in the Congress. That is what we are saying, as Secretary Shalala was pointing out.

Ms. VAN DUYNE. Okay. So I am looking at the Commission's report, and maybe I would just ask that you look at recommendation 2, because I just read directly from it. So I am not making the words up. But, I mean, when I read things like physically unable, it does not say mentally incapacitated. It does not say lacks the mental capacity. It says physically unable.

It says that, you know, modes of voting and participation must be open to Members, meaning it is their choice, correct?

Mr. BAIRD. Well, the point is that they have an opportunity to vote if they are not able to be here in person. That could be because it is not safe to do so. It could be because—

Ms. VAN DUYNE. Which I would argue could be extended to include what we have seen over the last 2 years where some people say it is not safe to be here.

Mr. BAIRD. Well, with respect, Congresswoman. I understand, I am not a fan of proxy voting myself. I would prefer direct remote voting, and there is technologies in countries that do it. We had extensive testimony by David Petraeus, former head of the CIA, former general and commanding in Iraq and Afghanistan. He managed those wars remotely and gave excellent testimony in a remote hearing we held.

It is plausible to do that, but the key issue here is if you don't provide some mechanism for that to happen in times of crisis—and we can argue about the day-to-day vicissitudes of that. If you don't provide that, you are essentially potentially abdicating the Article I, Article I branch responsibilities and authorities. We think that is a mistake.

Ms. VAN DUYNE. And I think that is the issue that I am having a hard time describing—a hard time on coming to terms with because I think we are on a slippery slope. I think if your—the doomsday scenarios that you are bringing up, I think are very valid, and I think those are ones that we need to consider moving forward.

My concern is that the recommendations, as I read them, and as I have seen put into play the last 2 years, it is a slippery slope that we are going down, what necessitates these procedures coming in, what necessities an emergency, what is defined, you know, by temporary?

And, Mr. Rogers, I know that you have comments as well.

Mr. ROGERS. Thank you.

I was just going to say you really went at something that the Members of Congress looked at back 17 years ago and 18 years ago when I was working on these issues, the balance between expediency and legitimacy. And those Members came out and the House majorities ended up voting on legitimacy over expediency.

And that really kind of goes to the foundational part of the government. Do you want to have people come in that are selected by the Members themselves without any voting, without any imprimatur of the states, without any imprimatur of the people, the

American people themselves to populate the people's House for 49 days, or whatever it is, but taking all those great actions that the gentleman at my left talked about would have to happen in 49 days? That was the concern, because it was certainly talked about. The constitutional amendment was back on the table back then, as it is now, but the Members decided, even though it maybe creates a situation, we have got to go with legitimacy because ultimately, we are talking about the people having faith in what's happening.

Thank you.

Mr. BAIRD. But the definition of legitimacy has been defined that somehow, five Member survivors are more legitimate than 435 temporary replacements chosen by the people who were last elected by the voters.

I don't possibly see how a micro quorum with lack of representation from many States and many districts has more legitimacy than a temporary appointment until such time as special elections can be held. I don't see how that it is more legitimate.

Mr. ROGERS. And if I could just answer that. The Constitution says that the Members be chosen by the people. It doesn't say that they will be chosen by their predecessors.

So, yes, you could have a micro quorum for a short period of time. Some of the testimony and talks that we had at the time suggested that people probably wouldn't be incapacitated for that long of a period of time; the idea that most of the things that incapacitate you either kill you or you get better relatively quickly.

The House rules, as Mr. Timmons was asking about earlier, if you die, you drop out of the quorum. It has been the rule now. And so, when people are concerned about the provisional quorum, perhaps they should be concerned about the House rule that when a person dies or resigns or—death, resignation, expulsion, disqualification, removal, or swearing, meaning swearing in, the whole Member of the House should be adjusted accordingly, which is clause 6 of—clause 5(d) of Rule XX. I say clause 6. The (d) and the 6 got juxtaposed in my head.

I think it is more legitimate to look at where the House has been. It has been there for a long time. This precedent, now codified, goes back to Deshler's precedence in chapter IX. So for a long time, when there has been a resignation or a death, the whole Member of the House adjusts and the quorum—and you guys see that. When you have had someone who has, you know, resigned or otherwise, you may not notice it, but the whole House number does change, and the quorum does actually change.

Ms. SHALALA. But the problem we are talking about is that that is for incremental Members—individual Members that may die or be incapacitated. What happens if a much larger number, and you end up with 10 Members of the House of one party? That is what our report speaks to.

Mr. ROGERS. And if I might, so we asked that question of Walter Dellenger, who—his take really resonated with the Members that ended up voting for the quorum rule, was, it is better to have some House than no House at all, that has been elected by the people.

Mr. CULVAHOUSE. Walter Dellenger was a law partner of mine, a friend of mine. I recruited him to the firm. I have great respect for him.

What we were talking about here, and with all respect to precedent and what—we are recommending a constitutional amendment. If that amendment is passed, by definition, then it is constitutional. By definition, it is constitutional.

And the reason we are recommending constitutional amendment is, as my colleague said, we didn't come to that. I am a conservative. I didn't—you know, I started out late. I am not in the business of recommending amendments to the Constitution, as our predecessor commission did.

But all of this came around to the fact that we have got a problem, and the problem is a majority of the whole House is a quorum. And in a nuclear catastrophe, the most obvious, but others—anthrax, whatever, chemical, dirty bomb—you could have a nonfunctioning House at a time when the Nation most needs—most needs a functioning House.

Congresswoman, the proxy voting, whatever, it really goes to facilitating a functioning House in a catastrophic circumstance. And we just think that if you are going to amend the Constitution, it would be nice to make it clear that the House has the rules, in emergency circumstances, or has the authority to authorize something other than requiring people to show up.

But our preference is people assemble in Washington. Our preference is they—our preference is that these temporary appointees be temporary.

The CHAIRMAN. Followup from Mr. Timmons and then Ms. Scanlon.

Ms. SCANLON. Thank you very much.

Mr. TIMMONS. Mr. Rogers, the unlikely situation of everyone being present at the State of the Union, all 435 Members, everybody dies, what happens?

Mr. ROGERS. Well, anecdotally, without knowing for sure, but when I was working for the minority leader and Speaker Boehner when he was Speaker, there were Members who were asked not to attend. And one of those Members told me he was asked to not attend—I don't know if that is an official policy or not. That is beyond the ambit of my knowledge. And certainly the designated survivor in the line of succession, and I believe sometimes you have Supreme Court justices who don't come for whatever reason.

So it is possible you could have a very thin amount of legitimately elected or confirmed people to act. In the absence of that, there is the idea I was mentioning earlier about continuity officers that are chosen as officers rather than Members temporarily, or you would have to do something else like the constitutional amendment.

The CHAIRMAN. All right. Ms. Scanlon.

Ms. SCANLON. Thank you. Thank you very much, Mr. Kilmer for having this important and I think long overdue hearing.

I am heartened by the fact that we do seem to have widespread agreement about some things that are not without controversy. One is that Congress should continue. The second is that we should have elected representatives in it and running the government.

But, you know, in the last 20 years and in the last 4 or 5 years, certainly we have seen physical attacks on substantial numbers of Members of Congress, whether it was 9/11, whether it was the

June 17 attack on the baseball team, baseball field, or January 6th, any which could have either decimated Congress or changed—significantly changed the balance of power. So physical attack is one thing we need to be concerned with.

Plague, and we certainly have been dealing with one of those. And, you know, as a member of the Rules Committee, and while I believe firmly that the Rules Committee is all powerful, as I am sure our former member, Ms. Shalala, does, I mean, there were challenges to trying to address an ongoing pandemic when we did not have vaccines yet and how we were going to keep Members safe when we had a change of Congress, and the rules that had permitted certain protective measures didn't exist anymore because it was a new Congress. So having something that can bridge Congresses and recess periods and that kind of thing seems more important than ever.

And then there is the cyber or other forms of attack. I mean, we have talked a little bit about, you know, a nuclear bomb taking out D.C. But what about taking down the air traffic control system? I mean, then we end up with a system where people can't gather or at least not for a significant period of time.

So all of these things, I think, are things we have to be concerned about. And I appreciate your trying to grapple with the constitutional, electoral, and other issues that we are dealing with here.

Mr. Lewis, I am so appreciative of the work that our election officials do across the country, across the political spectrum, and it is so important. I just wanted to quickly address a couple election administration issues.

You mentioned the paper that is used for ballots—paper ballots, that that could be a possible, sounds like a supply chain issue for quick elections. Was that what you were suggesting? That was right as I came in.

Mr. LEWIS. Well, ballot stock is a very specific stock that we order from printers, and we order it well in advance of a scheduled election, so that we have to rely on the vendors to get with the manufacturers to produce the correct number of ballot stock that we can use in any given election. Obviously, in an emergency situation, we may not have that luxury and probably wouldn't have that luxury.

The reason we go to such extraordinary lengths is to control so that we know that somebody didn't just slip in a ballot somewhere. By using ballot stock, we number it, we account for it, we count it, we know how many we received, how many we printed, how many were voted, how many were spoiled, and how many we have left. And that assures us of, then, that we didn't have manipulation of the outcome.

In an emergency, we may not be able to make any of that work. And so if we are going to have to vote on, for instance, plain paper, then we have got special considerations. We got to figure out how do we do a work around to make sure that the numbers that come up are the numbers that really are entitled to come up.

Ms. SCANLON. And that certainly goes to a preplanning kind of consideration that I think Secretary Shalala was mentioning, that that is something that if we know what we have to plan for, then we can plan for it.

I appreciate your talking about the integrity of the ballot stock. It has certainly been on people's minds in Pennsylvania and, you know, it has been useful to explain to people that Vladimir Putin can't just run off copies of ballots at FedEx or Kinko's and slip them in there without someone noticing. And in Pennsylvania in particular, we have 67 different counties that each order their own stock. So it is very, very difficult to mess with a Pennsylvania election.

Just one other question about the resiliency and what we might have to do with election administration in an emergency election. I think, I am sorry Mr. Davis had to leave, but he talked about not being sure that mail-in ballots would work because maybe the post office wouldn't be working.

But our State election officials have experience now with drop boxes and other forms of allowing people to submit their ballots other than the post office or the polling place, don't they?

Mr. LEWIS. Well, yes, assuming that—I think even in my testimony I mentioned, you know, if the post office doesn't work, if there is something that prevents them from working, we obviously are not then going to have mail as an option. So how do you come around and work around that?

If mail is an option, it then becomes an option that we can use and simplify the election for some folks. Admittedly, we still have to recognize most of the country does not have extensive experience in mail balloting, but we can always make that work.

This is—look, elections officials are incredibly resilient. They are going to figure out whatever we got to do to make something happen. The problem is whether or not that then has legitimacy in terms of the way the public interprets what we did. And that certainly is where we are at this point.

Ms. SCANLON. Sure. And having systems—known systems in place that people understand and don't appear to be under attack after the fact seems very important.

Mr. LEWIS. Just let me add one thing there. The problem for us as elections administrators all around the country is maybe 25 percent of the jurisdictions are as well funded as any other part of government, but that means 75 percent aren't. And so having resources to buy spares that you may use at some point in the next 20 years is not something that our jurisdictions are going to have enough money to do. And so it is one of those where we sort of have to say, you have got an emergency, we have to have emergency reaction, and that may or may not be possible.

Ms. SCANLON. Okay. Just turning to the similar issue of the legitimacy and such in assuring that any temporary replacement Members of the House have that legitimacy, much conversation. Can we elaborate a little bit, maybe starting with my colleague, Rep. Shalala, on sort of the criteria for who might be on these designated replacement lists, and has consideration been given—I think we talked about former Members or people who are already elected officials to address this issue of public buy—in.

Ms. SHALALA. No. We didn't—while we had a discussion about what they would look like, we didn't add that amount of detail. Just, we trusted the Member of Congress to designate a list, per-

haps, of people they thought were qualified, assuming in their own party, so that we wouldn't change the political mix maybe.

Ms. SCANLON. Anyone else want to comment there on—yeah.

Mr. CULVAHOUSE. Yeah. We talked—I will go to Brian quickly. I mean, we talked about such things as making it clear that they would be disqualified for standing for election. So, I mean, the confidence of the electorate and the government that there is—you know, that this isn't a way to, you know, to leave a legacy by will for your successor, to mandate your successor. We went back and forth over whether it should be public or private. So we just didn't—we left it silent with the notion that, you know, that the Congress and the drafters of the amendment are the best people to do it.

Brian?

Mr. BAIRD. Congresswoman, a couple quick points. One, unfortunately, I don't think there is agreement on this in the testimony today or even some of your colleagues that we do believe in continuity of the Congress. Because if we don't have a Congress for 49 days—and by the way, I should say, parenthetically, since that law was passed, there have been very, very few elections under normal circumstances in 49 days, let alone a national crisis.

And we would like to believe our enemies will play by the rule. They will only attack Washington, D.C. and only while we are—no, our enemies are going to attack us in multiple locations, rendering 49 days improbable and impractical. So there may not be agreement that we all favor continuity of the Congress.

One other really quick note, Mr. Chair, because I really want it to get into the record. The gentlelady from Texas who left, and I am sorry she did—Texas has on its books a law providing for temporary replacement from members of the designated members from their legislature. So Texas has in place already the very kind of mechanism that this commission has recommended. And so I would urge that the Texas government somehow needs to look at that and say, well, it works for us actually pretty well at the State.

The CHAIRMAN. I really appreciate—and I appreciate the final point, because I think your report said the average special election is, on average, about 150 days, so—

Go ahead, Mr. Rogers, and then we got to wrap. I am unfortunately going to have to set the land speed record to Rayburn.

Mr. ROGERS. Thank you. I will be quick.

First of all, during the look at the special elections law at that time, 10 States had less than or approximately 45 days. And during the consideration, the minority wished to have 75 days in the first Congress, which was voted down. And then 60 days was voted down the next time.

And I would respectfully disagree with Mr. Baird. I think during a national crisis, we will be able to focus quite a bit more because it will be the most important thing going on, and we will get it done in much less time.

Thank you.

The CHAIRMAN. I want to thank all of our witnesses for their testimony today. I would like to thank our committee members, as well as Representatives Scanlon and Loudermilk who joined us

today. I want to thank our committee staff for putting together, I think, a terrific hearing.

You get a sense of why we decided not to limit members to 5-minute questions because this is complicated stuff. And I think it is actually worthwhile for members to be able to pull on some of these threads.

I also want to thank our stenographers for taking record of the events of the day.

Without objection, all members will have 5 legislative days within which to submit additional written questions for the witnesses to the chair which will be forwarded to the witnesses for their response. I ask our witnesses to please respond as promptly as you are able.

Without objection, all members will have 5 legislative days within which to submit extraneous materials to the chair for inclusion into the record.

Again, I want to thank our terrific witnesses. I can't help but notice Norm Ornstein in the crowd. Seems like this would make for a very good Oxford-style debate, by the way. I know that you are the father of that idea.

I think this is a really important conversation, and I appreciate each of you being a part of it. And I am sorry that I am going to sprint out of the room and not be able to thank you personally, but please accept my gratitude.

And, with that, this hearing is adjourned. Thanks everybody.
[Whereupon, at 11:15 a.m., the committee was adjourned.]

APPENDIX I

A.B. Culvahouse Response to Rep. Williams' QFRs

Mr. Culvahouse, in your testimony, you highlighted that both holding special elections on shorter timeframes and operating under mass vacancies for long periods of time both could lead to undemocratic outcomes.

1. As we examine continuity of government reforms, how can we balance the need to hold fully democratic elections and the need to quickly restore democratic institutions? How should we look at balancing these considerations so we can best magnify the voice of all the people in our government, even during a time of crisis?

Representative Williams,

Your question strikes at the heart of the dilemma one faces in ensuring continuity of the House in catastrophic scenarios. The Framers of our Constitution established a rigorous quorum requirement—a majority of each House—because they were wary of the prospect of a small rogue unrepresentative group purporting to exercise the formidable power of Congress. On the other hand, the only mechanism for filling vacancies in the House is through special elections which ensures representative government in the ordinary course yet creates the very real possibility of a House that cannot meet or function for a lengthy period during a time of national crisis due to a lack of a quorum. Our Commission was uneasy about addressing this dilemma by abbreviating the special election process for two reasons—first, the length of time to conduct such shortcut elections nonetheless will be measured in weeks, not days; and second, the outcome of such compressed elections may not inspire confidence especially as House majorities and leadership may change weekly depending on the schedules for such elections in the states.

Even under the best of circumstances-- a single special election, conducted without any crisis-- takes on average four months. The only special elections we have experienced that meet a much shorter time frame are those that occur fortuitously closer to another general election already planned for and scheduled. For all the reasons Doug Lewis suggested, it takes time to perform all the tasks necessary to hold a meaningful election. Similarly, for the House to be truly representative of voters, there should be adequate time to select candidates and run an actual campaign, where voters can assess their choices in an informed way. In an election where candidates are chosen in a back room by a small group with little public input, and where a curtailed campaign is no campaign at all, those elected will not fully reflect the choices or the will of voters. Yet, waiting four months-- or conceivably longer, if there is a genuine national catastrophe that cuts off transportation or communications lines, or results in prolonged lockdowns—means no representation for a long time for constituents in a vacated district, and, without a quorum, no Congress at all.

For these reasons, we believe strongly in a constitutional amendment to replace very quickly members who die in office with temporary, emergency interim appointments-- only until meaningful elections can be held. This ensures continuity of representation and continuity of Congress without gaps, hitches or compressed elections.

Very respectfully,

A.B. Culvahouse
Ambassador (ret.)
Commission Co-Chair

George Robb Rogers

Former General Counsel, Committee on Rules, Assistant to the Speaker, &
Managing Partner, Republic Consulting, LLC

Before the

Select Committee on the Modernization of Congress

**Answers to *Questions for the Record* from the April 6, 2022 hearing
titled: “Congressional Continuity: Ensuring the First Branch is
Prepared in Times of Crisis”**

April 29, 2022

Question #1: *“Mr. Rogers, as the Committee discussed the status quo of Congress’s continuity plans during the hearing it appeared as though there could potentially be gaps in how Congress currently addresses the issue. Looking at the status quo now with the benefit of hindsight, could you provide your thoughts about potential gaps and potential options to close them?”*

Answer:

With the benefit of hindsight and in preparing for the hearing, there are several gaps that need to be addressed.

- **How Congress would function if all its Members were killed or incapacitated.** As I discussed during the hearing, Mr. William Pitts and I drafted a solution for this scenario. The House could create elected Continuity Officers of the House for each State. Under the Constitution, the House is empowered to choose its Speaker and other Officers (Art. 1, §2). The Speaker does not have to be an elected U.S. Representative and may vote on all matters before the House. The Clerk of the House, an elected Officer, presides over the start of each Congress and makes Parliamentary rulings. Continuity Officers could be elected from each state according to state election law requirements and the House could choose to seat the Continuity Officers chosen by each state. Continuity Officers would be empowered to act in the case of the catastrophic death of Members of the House. A

quorum would be a majority of the Continuity Officers. For example, if two Continuity Officers were elected by each State, then 51 would be the quorum to do business. Continuity Officers would continue to serve until expedited special elections occurred to replenish the House. I would suggest that any legislation enacted by Continuity Officers be subject to a sunset, unless subsequently enacted by Members of the reconstituted House.

- **Full Faith and Credit of the United States in a time of crisis.** Suspending or raising the debt limit presents a regular challenge to the Congress. Ensuring the borrowing authority to fund government operations in a time of crisis is essential. Preventing a default on the United States is imperative. One way to do this would be to enact a joint rule of the House and Senate that deems the passage of a debt limit suspension for a period of time following a national crisis.

Examples of joint rules include: (1) when the House and Senate count electoral votes¹; (2) when the House and Senate agree to adjourn the Congress for more than three days²; (3) when bills are on their passage between the two Houses they shall be on paper and under the signature respectively of the Secretary of the Clerk of each House, respectively³; and (4) after a bill shall have passed both Houses, it shall be duly enrolled on parchment by the Clerk of the House of Representatives or the Secretary of the Senate, as the bill may have originated in the one or other House, before it shall be presented to the President of the United States⁴. Other examples of joint rules enacted by the Congress may be found in the Congressional disapproval provisions in the *Executive Reorganization Act*, 5 U.S.C. §902; the *War Powers Act*, 50 U.S.C. §§1544-46; and the *National Emergencies Act*, 50 U.S.C. §1622(c).⁵

- **Appropriations and government funding in a time of crisis.** Similar to the issue of protecting the full faith and credit of the United States, in a time of extreme crisis, it may be an idea worth examining to have a mechanism providing for a short duration continuing resolution (CR) to provide necessary funding until the Congress can act.
- **Review of the Presidential Succession Act and Powers of the Presidency.** There are many questions that should be considered regarding Presidential Succession. In addition, a thorough review of the powers to act in an emergency granted to the President would ensure there are no gaps while maintaining separation of powers.
- **Voting by Members in hospitals or similar situations.** The House could empower the Sergeant-at-Arms and/or the Clerk of the House, and their designees, as Officers of the House, to travel to where Members are hospitalized or recuperating to record their votes.

¹ Lewis Deschler, *PROCEDURE IN THE U.S. HOUSE OF REPRESENTATIVES*, 97th Congress (GPO, 1982), p. 81.

² *Id.*

³ Asher Hinds, *HINDS' PRECEDENTS*, vol. 4, §3430, p. 311-12 (GPO, 1907); *HINDS'* vol. 5, §6592 (GPO, 1907).

⁴ *Id.*

⁵ For a further discussion of joint rules, see Charles W. Johnson, John V. Sullivan, and Thomas J. Wickham, *HOUSE PRACTICE, A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE*, 115th Congress (2017), available at <https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-115/html/GPO-HPRACTICE-115.htm>.

There have been proposals to allow for technology to enable remote voting, but the use of technology for voting brings with it great concern for the legitimacy of such voting due to the potential for a variety of cyber attacks that could call into question the ability to record the votes or to confirm their legitimacy. Additionally, depending on the severity of the crisis, national, state, and local communication networks may be significantly impaired or disrupted.

- **Adoption of House Rules if a catastrophe occurs prior to convening a new Congress.** The Senate, as a continuing body, has rules that endure from one Congress to the next. However, the House must adopt new rules at the start of each Congress. This requirement could present issues if a catastrophe occurs prior to the convening of a new Congress. The House might not be able to swear in Members, organize, adopt its rules of procedure, or conduct votes for some time. As discussed below, this may be a topic that a joint committee of the House and Senate should consider, or the House on its own may adopt a deeming process where, in times of catastrophe, its rules and processes from the prior Congress are kept in effect.

Question #2: *“Mr. Rogers, the last time Congress took up the issue of continuity it attempted to form a joint commission on the subject with the Senate which never came to fruition. Do you still see value in forming such a commission today? How would you advise we structure and scope such a commission?”*

Answer:

I do see great value in a joint committee of the House and Senate to review and make recommendations on the Continuity of Congress. In 2003, then-Committee on Rules Chairman David Dreier (R-CA) and then-Committee on Rules Ranking Member Martin Frost (D-TX) authored *H. Con. Res. 190*, “to establish a joint committee to review House and Senate rules, joint rules, and other matters assuring continuing representation and congressional operations for the American people.”

All of the Democratic and Republican Members of the House Committee on Rules cosponsored the legislation. The Speaker referred the concurrent resolution to the Committee on Rules, which favorably reported the measure by voice vote. On June 5, 2003, the House agreed to the resolution by voice vote.⁶ The Senate did not act upon the measure before the expiration of the 108th Congress. The Senate leadership at the time expressed interest, but they did not want to create a joint committee until the Senate had settled the question of committee jurisdiction over the issue of homeland security.

As stated in *House Report No. 108-141*:

There is still uncertainty about Congress’ ability to act decisively to maintain homeland security while preserving the democratic and representative fabric of our society. Accordingly, Congress should undertake a thorough review of House

⁶ <https://www.congress.gov/bills/108th-congress/house-concurrent-resolution/190/actions>

and Senate rules, joint rules, and other related matters to ensure the functioning of Congress in the event of any catastrophe.

Under the Constitution, each chamber has the absolute right to establish its own rules. The joint committee established in this concurrent resolution would not affect this Constitutional prerogative of each chamber. However, it is vitally important for the general welfare of our nation that the House and Senate can work together in an effective and decisive manner during times of catastrophe—when even the existence of the national government may be at stake.⁷

On a number of prior occasions, from 1806 to 1992, the Congress has established joint committees of the House and Senate to study and make recommendations on important matters. Examples of the jurisdiction and function of prior joint committees have included:

- Development, use, and control of atomic energy (1946-1977);
- Review of the programs established by the Defense Production Act of 1950, federal emergency preparedness and mobilization policy, and for other purposes (1950-1978).
- Organization and operation of Congress, relationship between the two Houses and between Congress and other branches of government, and committees (1945-1946, 1965-1967 and 1992-1993).⁸

The full text of *H. Con. Res 190* as engrossed in the House was:

108th CONGRESS

1st Session

H. CON. RES. 190

CONCURRENT RESOLUTION

Whereas the Government must be able to function during emergencies in a manner

⁷ H.R. REPT. NO. 108-141, pp. 2-3 (2003).

⁸ *Id.*, at pp. 6-12.

that gives confidence and security to the American people; and
Whereas the Government must ensure the continuation of congressional operations,
including procedures for replacing Members, in the aftermath of a
catastrophic attack: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring),
That (a) there is hereby established a joint committee composed of 20
members as follows:

(1) 10 Members of the House of Representatives as follows:

5 from the majority party to be appointed by the Speaker of the
House, including the chairman of the Committee on Rules, who
shall serve as co-chairman, and 5 from the minority party to be
appointed by the Speaker of the House (after consultation with
the Minority Leader); and

(2) 10 Members of the Senate as follows: 5 from the
majority party, including the chairman of the Committee on
Rules and Administration, who shall serve as co-chairman, and 5
from the minority party, to be appointed by the Majority Leader
of the Senate (after consultation with the Minority Leader).

A vacancy in the joint committee shall not affect the power of the
remaining members to execute the functions of the joint committee, and
shall be filled in the same manner as the original selection.

(b)(1) The joint committee shall make a full study and review of
the procedures which should be adopted by the House of Representatives,
the Senate, and the Congress for the purpose of (A) ensuring the
continuity and authority of Congress during times of crisis, (B)
improving congressional procedures necessary for the enactment of
measures affecting homeland security during times of crisis, and (C)
enhancing the ability of each chamber to cooperate effectively with the

other body on major and consequential issues related to homeland security.

(2) No recommendation shall be made by the joint committee except upon the majority vote of the members from each House, respectively.

(3) Notwithstanding any other provision of this resolution, any recommendation with respect to the rules and procedures of one House that only affects matters related solely to that House may only be made and voted on by members of the joint committee from that House and, upon its adoption by a majority of such members, shall be considered to have been adopted by the full committee as a recommendation of the joint committee.

(4) The joint committee shall submit to the Speaker of the House of Representatives and to the Majority Leader of the Senate an interim report not later than January 31, 2004, and a final report not later than May 31, 2004, of the results of such study and review.

(c) The joint committee shall cease to exist no later than May 31, 2004.⁹

In conclusion, a new joint committee of the House and Senate could “consider whether joint rules or other joint mechanisms can be a useful means during times of crisis for managing of inter-chamber relationships and the promotion of bicameral coordination, communications, and consultation.”¹⁰

⁹ <https://www.congress.gov/bills/108th-congress/house-concurrent-resolution/190/text>

¹⁰ *Id.* at note 7, at p. 9-10.

Brian Baird Response to Rep. Williams' QFRs

Congresswoman Shalala and Congressman Baird, thank you for your work on the commission and helping us tackle this difficult topic. As a former state legislator turned Congresswoman, I always try to take lessons from states that have implemented good ideas.

1. Are there any states that have continuity plans that have inspired your work and recommendations? More broadly, what ways can we be sure that we make evidence-based policy when it comes to the continuity of government?

Congresswoman Williams,

Thank you for sharing your personal experience with us and for the very thoughtful question. In response to your question, there are indeed some very relevant examples from the states, including procedures that are very similar to the recommendations of the current Continuity of Government Commission report. Most notably, as detailed in my written testimony, (the relevant subsection of which I have copied below), several states have a process of member nominated lists of successors who would fill a vacant position until special or regular elections could be held. My understanding of the history of these measures is that many were implemented during the cold war era. Sadly, we seem to be entering such an era again but this time there are added domestic threats that make the dangers, and the need for solutions, all the more pressing.

In the testimony excerpt below, for the sake of brevity I cited just two examples from the referenced NCSL report. But that source document lists a number of other examples of state level continuity procedures, including those that presaged the Commission recommendations as well as alternatives.

To reiterate, if I may here, our goal as a commission in proposing the remedy of member chosen temporary replacements is to ensure that the people have a continued voice and representation in Congress and that events, be they natural or the result of hostile actions, can neither deprive the Congress of achieving a real quorum of the constitutionally mandated "majority to do business", nor can such vacancies deprive the people of representation, nor can they alter the ideological/political perspective of that representation.

Again, it is important to emphasize that the seating of a temporary, member designated replacement would only take the position in the event of the death of the incumbent and only until a responsible and valid election can take place. If the proposed recommendations are implemented, special elections will be held just as rapidly as would currently be the case. The difference is, under the proposed commission remedy, Congress could continue to function with

valid numbers for a legitimate (not an unconstitutionally diminished) quorum, with continued representation of all districts and the people therein, and with no arbitrary or intentional changes in the balance of political power.

Speaking personally for a moment, and not on behalf of the Commission. I believe this is of special significance in the current climate of anger and animus, much of which is tinged with racism, antisemitism and other forms of prejudice. At a time when people are openly calling for "bullets over ballots", when threats against members of Congress and their staff have reached record and frightening levels, and when some of your colleagues in Congress have "joked" about killing their colleagues, I believe, as a former Member of Congress myself, that continuity provisions, or a lack thereof, must not in any way allow deliberate hostile actions to not only claim the lives of elected members of Congress but also, in the process, achieve a political end of changing the balance of power in the House or Senate through such heinous acts. The truth is, the status quo would allow just such an outcome, but the Commission's proposed remedy would prevent that from happening.

That, in my judgment, is a very compelling argument in favor of adopting the Commission recommendations for temporary, member designated replacements should a member die while in office. It is thoroughly proper to protect "everyone's sacred right to vote and choose their representation ." as you indicate in your inquiry. But I would assert that the biggest threat to that right would be to allow someone to undermine the people's choice through the assassination of the individuals the people elected. Under the Commission proposal, should there be such a horrible event, the assailant, be they foreign or domestic, might succeed in claiming the life of the incumbent, but if the targeted incumbent, acting on behalf of those who elected him or her, nominated a temporary successor of comparable ideology and character, the assailant will not succeed in taking away the will of the people in choosing the kind of person and positions they supported with their votes. Thereby, the proposal of the Commission acts not only to ensure continuity of the Congress as an institution, but also to ensure the right of the people to have representation and their right for that representation to continue to reflect their values. What is more, by providing such assurance, the Commission proposal also may help reduce the incentive or perceived gain to be had from acts of political violence, thereby serving, in an important sense, as a form of insurance for the well being of those who have been elected, including yourself and your colleagues in the House.

I hope this will be useful information and I will be more than happy to provide any additional context or material if it will be helpful.

Thank you again for considering this profoundly important matter with the attention and thoughtfulness that it deserves.

Again, please see the relevant excerpts from my testimony immediately below for further information.

Respectfully,

Brian Baird - Member of Congress (Retired)

Examples Of Similar Provisions in State Level Continuity

The risks of the status quo and the benefits of the proposed alternative should be sufficient to make the case for the proposed solutions, but we can also find reassurance in the fact that very similar provisions are already in place in a number of states.

The National Council of State Legislatures has reviewed continuity provisions in every state <https://www.ncsl.org/research/about-state-legislatures/emergency-interim-succession-acts.aspx>, revealing that some mechanism of temporary replacements exists in multiple states.

For example, Alabama's continuity statute reads,

"Ala. Code §29-3-4

Each legislator shall designate emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.(Acts 1961, No. 875, p. 1371, §4.)"

Louisiana also provides for similar replacement

La. Rev. Stat. §24:64.

Each legislator shall designate a panel of not less than three nor more than seven emergency interim successors to his powers and duties. Each legislator shall review and, as necessary, promptly revise such panel of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors on said panel. Such panels and all revisions thereof shall be filed in the office of the secretary of state.

Oklahoma has a comparable provision.

Okla. Stat. §63-686.4.

Each legislator shall designate not fewer than three nor more than seven emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.

Laws 1959, p. 215, § 4; Laws 1963, c. 340, § 4, emerg. eff. June 24, 1963

We often talk in our country about the states being the laboratories of the republic. In this case, at least some of the states have been far ahead of Congress in finding cures for the problems of succession. The Congress would do well to learn from those measures and implement them as quickly as possible.

Under the 17th Amendment, States already have a right to choose whether or not opt for this solution as a replacement process for U.S. Senators, but if they choose not to do so, they should make that choice knowing they are exposing themselves and the nation to all of the machinations, politics, and autocratic power usurpations described above.

Legislators and, most importantly, the voters in every state should recognize that it is in their best interest to provide for rapid replacements that ensure the will of the voters is maintained and that the state will have continued representation in both the Senate and House as decisions of major consequence are made in Congress. Legislators and voters should also be aware that by failing to address the problems of partisan gubernatorial Senate replacements, they may be exposing their own elected senators (and, we must add, potentially, if you think about it, their governors as well) to an elevated personal risk.

Establish the Rules Immediately – Then Ratify an Amendment

It is in the interest of the nation, all the states and of the citizens themselves that the proposed recommendations be implemented as quickly as possible. The reality, however, is that many of the proposed changes, particularly those regarding temporary House replacements, should ultimately be formally established through an amendment to the Constitution. However, as a practical matter, constitutional amendments can take a very long time to enact and, until that time, our nation would be left unnecessarily vulnerable to our adversaries or natural events.

Knowing the potential risks and the many shortcomings of the status quo, it is unwise, possibly irresponsible, for Congress not to act immediately to put in place at least a provisional remedy that could ensure its own continuity in a time of crisis.

Therefore, it is recommended that Congress should enact the proposal as a House and Senate rule initially, notify the states of its enactment, and proceed accordingly to prepare the requisite lists and procedures for replacements should the need arise. From there, work on the formal amendment can take place.

APPENDIX II

Additional Material and Comments for the SCMOC Hearing on Continuity of Congress

Prepared by the Honorable Brian Baird (WA3, 1999-2011)

April 6, 2020

As is thoroughly appropriate with hearings on any topic, other witnesses in today's hearing have offered written remarks and oral statements in contradiction to certain of the recommendations of the Continuity of Government Commission. It is not practical or necessary to respond word by word to every element of such testimony, but several important points must be made for the sake of accuracy and in the interest of thorough and fair information and analysis.

In testimony of Mr. George Robb Rogers, he defends the status quo and criticizes recommendations made by the prior and current Continuity of Government Commissions, hereafter referred to as the Commission. The structure of Rogers' argument takes essentially two tracts. First, there are references to source quotes extracted, in several instances out of context, from selected passages written by some of the founders. The second tract attempts to make the case that because prior votes in Congress failed to sustain some of the recommendation made by the prior Continuity Commission, and by the author of this reply as well as others, that prior action should be treated as virtually dispositive evidence that there is not intrinsic merit to the Commission recommendations and, therefore, they should be dismissed without fresh review of their rationale or in light of events that have transpired in the interim since they were first considered.

In this response to that testimony and other issues that arose in the hearing, I address each of the tracts in Mr. Roger's testimony and identify their shortcomings as vehicles for constructive discussion or problem solving and as obstacles to obtaining real solutions to the very serious real-world problems we are facing today.

Following that, I offer some observations about the makeup and process that led the Continuity of Government Commission to reach the conclusions offered in its report. I then turn to further analysis of the vital underlying questions about the difficult but not insurmountable challenge of trying to ensure both that the people and states will have representation in the Congress and that they will have the right to choose their representatives by election. Finally, I conclude with a brief discussion and clarification of issues pertaining to remote proceedings.

“Quotes” From the Framers

With regard to the first tract of argument offered by Mr. Rogers, I fully acknowledge and agree from the outset that there is much to be learned from studying all the writings of all the founders as well as the deliberations surrounding the constitution and the actions of the first Congress. But the practice of taking select quotes without context and citing those as if they are or should be taken as the only or final word on a matter is unwise. It is unwise because the potential exists for an endless game of, for lack of a better word, “quote tag” in which one person cites a quote from one framer in one context, then the other counters with a different quote from a different framer, with the result being an endless repetition of arguments that are now nearly 250 years old, are being taken out of context, and, truth be told, were not universally accepted even when they were originally stated.

To illustrate the hazard of that approach, let us begin with Mr. Rogers’ assertion on the very first page of his testimony and repeated in his oral remarks that “As Madison said, “Where elections end, tyranny begins.” Rogers cites as a reference The Federalist No. 53. In point of fact, however, although Wikipedia does cite Madison as the source of that paper, the Library of Congress indicates that the author may have been Madison or Hamilton, it is uncertain which. Still more importantly, the quote itself as cited by Rogers is both inaccurate and out of context. The exact quote and its important context is this:

“I SHALL here, perhaps, be reminded of a current observation, “that where annual (underline added for emphasis here by BB) elections end, tyranny begins. If it be true, as has often been remarked, that sayings which become proverbial are generally founded in reason, it is not less true, that when once established, they are often applied to cases to which the reason of them does not extend. I need not look for a proof beyond the case before us.”

I have taken the liberty of underlining the word “annual” because it was in the original but was omitted from the quotation as cited by Mr. Rogers, which is rather puzzling. The fact is, Madison (or Hamilton) was actually discussing the question of how frequently elections must be held and, as the remainder of his remarks reveal, he was using that quote to illustrate how “proverbial” phrases once established “are often applied to cases to which the reason of them does not extend.” Which, ironically, is precisely what is demonstrated by the very use of that “proverbial” phrase out of context and inaccurately cited in the current example of Mr. Rogers’ own testimony.

In addition to the hazards, as we have just seen, of taking selected quotes out of context, especially when they are actually misquotes, there is also the problem that many alternative statements by equally credible authors of the era could just as easily lead to alternative interpretations about the intent of the Constitution and the framers as they apply to the current debate. Not wishing to trigger the very game of quote tag that was admonished against earlier, it may nevertheless confirm the merit of that admonition by citing an example to illustrate the point.

Hamilton, in Federalist 59 wrote,

“I am greatly mistaken, notwithstanding, if there be any article in the whole plan more completely defensible than this. Its propriety rests upon the evidence of this plain proposition, that EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION. Every just reasoner will, at first sight, approve an adherence to this rule, in the work of the convention; and will disapprove every deviation from it which may not appear to have been dictated by the necessity of incorporating into the work some particular ingredient, with which a rigid conformity to the rule was incompatible. Even in this case, though he may acquiesce in the necessity, yet he will not cease to regard and to regret a departure from so fundamental a principle, as a portion of imperfection in the system which may prove the seed of future weakness, and perhaps anarchy.

It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere.”

With full acknowledgment that there is more detailed and nuanced context to this quote, one nevertheless is struck by the fundamental assertion, with the capitalization in the original, that “EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION” Hamilton’s emphasized point is that one must not be foolish enough to create a constitution that does not allow the Congress to preserve its own existence - there must be adaptability to circumstances. Hamilton, in that same paper and elsewhere, goes on to discuss in fascinating detail the possible machinations and obstructions that could result if certain states chose not to hold elections in order to prevent a quorum of the federal Congress. I mention that here to demonstrate that far from this being a long settled matter, as critics of the Continuity Commission recommendations seem to want readers to believe, in fact these were and still are complex and evolving issues that deserve careful and full consideration, not dismissal based on selective quotes or misquotes from one or another of the framers.

What is more, even as we revere the framers, it should not go without mention that careful reading of the writings and actions of the framers reveals that one can also, in many cases, select different quotes from the very same individual and find contradictions with themselves. Madison is but one example, in which a statement, even a very strident one, made at one point in his life and thought, was later contradicted by something else he said or did.

Thus, one could go on, and, on, and so on, selecting quotes and counter quotes from this or that federalist paper or other documents of the era. But the framers could not possibly have anticipated all the challenges the nation faces now, nearly a quarter millennium later, and we have to deal responsibly with those challenges and realities now.

The Paradox of Preventing Representation In Order To Save It

There is one other important note about Hamilton's quote and the problems facing us now. There is a puzzling and consequential paradox in the implicit contention of some that having no Congress at all, a "micro" Congress, or one that is not fully representative for nearly two months or more is somehow more legitimately consistent with the constitutional intent of the framers than would be a mechanism to provide for temporary replacements and ongoing representation that could be allowed through a ratified amendment as provided for in the Constitution itself. The whole point of the Continuity Commission's recommendation of such an amendment to the Constitution is to honor Hamilton's adage our government must "CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION".

By refusing to even consider the proposed amendment, and by justifying that refusal in the name of defending the Constitution, but then, instead, defending an unconstitutional quorum reduction in the Rules, some who would likely put on a self-appointed mantle of "defending the constitution" may, in fact, through their actions or inactions, be undermining the Constitution they are claiming to defend. In so doing, they are preventing the Commission's effort to ensure that Congress truly has the legitimate means of its own preservation. That could prove one day to be tragic.

Prior Votes and Judicial Rulings

Let us now consider the second tract of argument, i.e. that because certain measure were previously rejected while others were implemented by prior Congresses, we should, therefore, accept those that were enacted without further analysis or change and refuse to revisit proposals that have been rejected without further consideration.

In his testimony, Mr. Rogers seems to want to amplify the imagined power of this line of argument by citing the voting margins from prior congressional actions, as if those percentages necessarily prove beyond doubt that the solution in place today is a good one and the alternatives would not be. That might seem like a tempting argument because, after all, it could save us all a lot of work if we could convince ourselves there is nothing left to do or undo.

That form of argument might be valid if one assumes that everything that has ever been done in the past must necessarily be right, while nothing that was ever considered but not done must therefore have been mistaken to begin with. It might also be compelling if in actual practice the enacted solutions, as well as the rejected alternatives, could be put to a real test to see which better served the nation.

Obviously, we must hope such an actual test will not come to pass, but we can nevertheless give serious analysis to what might happen if it did. We can also, with a very little effort, easily identify countless examples in which Congress and other decision making bodies, sometimes by very wide margins, have taken one course of action which turned out to be the wrong thing to do or, conversely, has rejected an alternative or failed to do something that would have been far superior.

The rule allowing for an infinitesimally small quorum number is perhaps the best (or worst) example of this. The fact that such a rule has been repeatedly passed by successive Congresses does not make it any wiser or inherently less dangerous, nor does it make it constitutional which, the Commission and many other scholars believe it patently is not. The stakes are far too high for such complacency.

What this means in practice is that much of the testimony and legislative history offered in great detail by Mr. Rogers, while perhaps of some historical interest, is not necessarily a guide to what is actually the right thing to do or not to do under the current circumstances and facing foreseeable events that could come to pass quite literally on any given day.

Furthermore, it is also worth seriously considering how the general public, or for that matter even the members of Congress who themselves voted for some of the measures Mr. Rogers testimony points to as settled solutions, would react if they really knew what those measure were or what they implied in practice.

It is worth pausing for a moment to contrast the vote totals and deliberations of the Congress as a whole with those of now two separate blue ribbon bipartisan Continuity Commissions, both made up of distinguished scholars and practitioners who have

together spent hundreds of hours intensively studying all aspects of this topic. In spite of political and ideological differences coming in, and with representation from conservative as well as progressive scholars, experts and former members of Congress, both sets of Commission members have reached a joint conclusion that differs from the current practice and the results of prior votes.

To fully appreciate the diversity of perspectives on the current commission, it is worth reviewing the backgrounds of the current Continuity Commissioners and their affiliations and backgrounds. More details about the commission members is available in the just released full report. There one finds on that list former Republican Members of Congress, former legal counsel for Vice President Pence and President Reagan, former deputy chief of staff for Senator Mitch McConnell, the former staff director for the Senate Committee on Rules and Administration, former Democratic Members of Congress, experts in Constitutional Law, prominent congressional scholars, a sitting U.S. circuit judge for the U. S. Court of Appeals, and directors of government agencies.

In their approach, both the prior and the present Continuity Commissions have jointly and objectively studied the matters at issue, discussed them in detail on multiple occasions, and explored and weighed the pros and cons over a period of many months, in some cases over a period of many years.

It is fair to suggest that perhaps not all those in Congress who voted yea or nay on the prior measures that Mr. Roger's cites actually gave the matter the same level of attention and consideration as have the Commissioners. And this is perfectly understandable. The commissioners were intensely focused on continuity, while members of Congress have a lot, in fact too much, on their plates. With no intention of criticizing specific individual members of Congress, experience suggests strongly that many members may have been following the instructions of their committee or party leadership but had not studied the issue in detail prior to voting.

To illustrate this, one could ask this very day of members of Congress who voted for or against the House rules if they honestly are aware that in the process they were voting on allowing for a quorum to be redefined with no minimum number necessary for the House to do business. My own informal inquiries over many years tell me that although nearly every member of the House casts a vote one way or another on the House rules package at the beginning of the term, and while all members of Congress live and work under the constraints of those rules every day, fewer than one in twenty (and that's being generous) have ever thought about or are even aware of that quorum redefining clause and its absence of a minimum number. If Members of Congress are

not even aware of what they are voting for or against, the attempt to cite vote totals for or against a measure can hardly serve as evidence that members have with full knowledge and consideration rejected or approved a specific proposed or existing measure.

Imagine taking a different approach and asking members of Congress as a whole or the general public this question, "If the nation were attacked and only two members of Congress survived, possibly from the most extreme ideology of one side or the other, should those two individuals be allowed to declare themselves to be the entire House of Representatives, choose one of themselves to be President of the United States, then enact laws for the entire nation until special elections could be held nearly months later?

For the record, I am certain the entire Continuity Commission unanimously believes such actions would be blatantly unconstitutional and contrary to every instinct or intent of the framers. Yet that very scenario would be allowed under the House rules that Mr. Rogers defends in his testimony and asserts would solve the problem of continuity in a constitutionally valid way. Indeed, Mr. Rogers testimony seems to argue that possibility of a micro quorum of extremists is perfectly acceptable to him and to those he cites as having voted for it. In fact, he seems to display evident pride in the accomplishment. On that basis, he asserts there is no need to enact, or even really consider, the Commission recommendations for temporary replacements because the problems have already been solved and little or nothing further needs to be done.

My personal belief is that, notwithstanding the fact that they may have voted for the Rules without realizing the quorum minimization provision was there, most members of Congress and the public would be shocked to learn this is in the House rules and would vehemently protest such monumentally important decisions being made by so few individuals while the rest of the nation lacked any say in the matter. That situation is not the salvation of the Constitution or representative government, it is the antithesis of it.

This is a good time to also address the fact that just as it is not compelling to recite prior House or Senate votes on this as evidence for or against the Commission recommendations, the same can be said of the recitations of parliamentary and Court "precedents" presented by Mr. Rogers. It is beyond the scope of this response to go into detail here, but the actual circumstances in which the courts acceded to decisions of the Congress regarding its own rules are far different from the scenarios just described or that we must imagine.

Leaving Things to The Courts

It sometimes happens that people, upon learning of this issue and encountering the complexities involved, take shelter (and avoid the complexity and responsibility of resolving it) by retorting “Well, if there’s a constitutional challenge, people can take it up with the courts when the time comes.”

That argument, which has in fact been made with disconcerting frequency, shows a failure to appreciate what a nuclear or biochemical weapon is capable of or how vulnerable every person and institution in this capital city actually is. We must recognize that all of the institutions of our government can be affected by the same event, and none, including the Supreme Court, have valid fool proof continuity provisions (the court in fact has none). To put it starkly, waiting for an imminently foreseeable constitutional crisis to occur and depending on a litigious process to be heard and resolved by dead jurists is hardly responsible preparation.

The Real Questions Before The Select Committee, The Congress and the Nation

Which brings us to the fundamental substantive questions that we really should be discussing. If we recognize and accept the reality of the threats facing the nation and Congress, and recognize, as the framers certainly did, that human nature does not assure people will always do the right thing under difficult circumstances, and if we believe in representative government, how do we anticipate, prepare for, and best respond to those threats in a manner that preserves the most important tenets of our representative democracy? And, how do we weigh the important and legitimate desire and right of the people and the states to have representation in the House and Senate, with the also legitimate desire to be able to directly select that representation?

This is not a simple as it might appear and the response does not have to be a binary choice of one or the other. In fact, the framers themselves came down on both sides of this issue. So too do current replacement practice in the House and Senate, and as do examples in different state legislatures, including several states whose districts are represented by members of this very Select Committee on Modernization and participants in today’s hearing.

Considering the critiques of Mr. Rogers and others who opposed or questioned the Commission recommendations, several points must be emphasized. Many of those critiques were addressed already in the written recommendations of the Commission submitted before the hearing today, in my own written testimony, and in comments of

the panel today. I repeat and elaborate below on what strike me as the most important of these considerations.

1. While there is shared agreement on the importance of elections in our democratic republic, the inflexible insistence that no one must ever serve in the House without being directly elected, even in times of national crisis, has the paradoxical effect of allowing events, even the actions of terrorists, to dramatically alter, without elections and contrary to the will of the people as expressed in the last election, the decisions that are made in Congress and who makes them.

If a natural event, accident, or hostile attack by foreign or domestic actors claims the lives of sufficient numbers of House members, the political balance in the House can be shifted, without a vote of the people and contrary to the results of the election. This could have the effect, again without a vote by the people, of placing a different party in the majority in Congress, with all that entails legislatively. That undemocratic outcome would, ironically but causally be the result of a dogmatic effort to insist on elections and only elections to the House under any and all circumstances.

2. It cannot be stated often or emphatically enough that NOTHING in the Commission recommendations removes, reduces or delays the rights of the people to choose by election the ultimate successor to a deceased member. To suggest otherwise is misleading and deceptive. In fact, the Commission expressly endorses the principle that special elections must be held as rapidly as possible. So the argument that somehow this is an “either/or” choice, and that voters can either elect their representatives or have them appointed, is actually a misleading straw man.

Unless one can hold an instantaneous election that is legitimate and deliberative immediately after one or many deaths, there must either be protracted vacancies or some interim replacement until elections can be held. The question is not should or will those elections be held. They must and will. The real question is, do the people have representation in Congress or do they not have representation during that extended time it takes to hold a fair and meaningful election. The Commission recommendations provide assurance of both

continued representation and real elections in a timely but meaningful manner. The mechanisms currently in place do not.

3. It is demonstrably inaccurate to oppose temporary replacements by asserting that the Constitution or the Framers were adamant that direct election by the people is the only legitimate form of representation in Congress under any and all circumstances. In fact, the Constitution as originally ratified had Senators chosen not by the people but by the legislatures. So the framers themselves and the Constitution as written recognized that representation can be legitimate if it comes either through direct election, as in the case of the House, or indirectly as in the case of the Senate prior to the 17th Amendment. It is true that the Senate was initially designed to represent the interest of the States, with the House representing the interests of the people themselves. But those who argue that without direct popular election tyranny inevitably follows must somehow reconcile how that argument does not apply to the Senate which, for more than a century, did not derive from direct elections and votes of the people.
4. Speaking personally here and not on behalf of the Commission, it is important to recognize that the 17th amendment, while instating direct election to the Senate, also, as I described in my original written testimony, institutes the non-democratic mechanism of autocratic gubernatorial replacement of Senate vacancies. This would seem to create a logical problem for opponents of the Commission recommendations.

On the one hand they decry anything but direct election in the House and declare that any deviation would inevitably lead to ruin. But they then seem perfectly comfortable with a far less democratic replacement process for the Senate that enables a single individual, the Governor, possibly from the opposite political party and ideology, to select a Senator whose views and characters might be antithetical to the person the voters previously elected.

The lack of logical consistency in the critiques of the Commission recommendations and the defense of the status quo is rather mind boggling. In one instance replacements in the House are alleged to be tantamount to tyranny, even though if done properly the replacements would actually ensure the voters have continued representation and their voted for preferences in terms of

political and ideological perspectives would be maintained as closely as possible. Meanwhile, a non-democratic autocratic process is authorized for the Senate in the Constitution and is tacitly accepted by most states as standard procedure for replacements in the Senate, even though that process can completely reverse the political will of the voters and alter the majority of the whole Senate without any direct election at all.

5. So the choice really is, if one or all members of Congress die in office, the people can either have a temporary person represent them till an election can be held, or they can have no representation at all while decisions of major consequence are made. The status quo, the House Rules, and the testimony of Mr. Rogers, comes down in favor of no representation at all under those circumstances.

Yet if we truly believe in a representative government, as the Constitution calls for and Commission members adamantly embrace; and if it is in the best interest of the voters and the nation that every voter and state have full and uninterrupted representation in the House and Senate; and if that representative form of government is fundamental to a republic, which the Commission believes it is; How then can those who claim to defend representation and oppose temporary appointments also support a bill called "The Continuity of Representation Act" which in practice would create a system that potentially leaves hundreds of millions of Americans with no representation whatsoever in either the House or Senate for at least nearly two full months at a time of national crisis? And how could such a protracted and potentially imbalanced period of vacancies be consistent with the intent of the framers to ensure that all the people have a voice acting on their behalf in the federal legislative body?

6. If it is accepted, as the Commission believes it should be, that some form of representation is actually more representative than no representation at all (the paradox of that sentence is not lost on this author, but it seems to be lost on those who oppose temporary replacements) the next logical question is, How do we select those temporary replacements?

The answer, the Commission believes and has proposed, is that the person most qualified and legitimate to make that decision, and again this is only for a temporary successor and only upon the death of the incumbent, is the person the

voters last elected, and thereby entrusted, to act on their behalf and to represent them on all other matters before the Congress. There is no other person who has earned that level of trust from the voters of that same congressional district, and that person has been delegated the authority to make virtually every other decision of consequence as specified in Article I. Hence, there is no one better or more legitimately chosen person to also fill the responsibility for selecting a temporary replacement, but only, it must be emphasized, upon the death of the very member who made the selection.

If we do not trust someone to make such a momentous decision wisely, then we should not have elected them to begin with or entrusted them to make all the other decisions required of their role as Representative. Further, even if that member, as their last official act, rather than selecting a list of truly qualified successor, wants instead to leave a legacy of nepotism or political cronyism (as some have expressed concerns about), they will have to pay a high price to do so, i.e. death, and that price will only be paid for a transitory outcome that can be reversed by the voters when an election is held.

7. Some members of Congress, in spite of all the points made above, may understandably still not feel comfortable initially with entertaining the possibility of temporary replacements. If so, they may find reassurance in the fact that, while this is not yet the practice at the federal level in Congress, it has already been in place in a number of states for many years. Indeed, as a comprehensive review by the National Council of State Legislatures reveals <https://www.ncsl.org/research/about-state-legislatures/emergency-interim-succession-acts.aspx> a number of states already have such mechanisms in place. Consider, for example, this language from South Carolina

Each member of the General Assembly (hereinafter referred to as legislator) shall designate not fewer than three nor more than seven emergency interim successors to his powers and duties and specify their order of succession. Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.

S.C. Code Sec. 2-5-40.

The rest of that code goes on to describe the manner and circumstances through which these temporary successors would assume the duties of the deceased predecessor.

Other states have similar provisions, including the state of Texas. That is noteworthy because one of the sitting members in today's hearing represents a district in that state and seemed to express serious concerns and reservations about what is essentially the same process in place in Texas now being proposed for the U.S. House.

We often extol the virtues of looking to the states as the laboratories of democracy. If that is so, the states, and a number of other nations for that matter, have come up with something the Commission suggests the Congress should listen to and learn from.

8. The penultimate point to be made here is to underscore that if temporary successors chosen by the incumbent do actually fill the vacancy upon the incumbent's death, that obviates the whole matter (and associated risks) of lowering the quorum number to an unconstitutional and unrepresentative number. It also disincentivizes violence as a mechanism for change without elections.

In the event of any deaths in Congress, regardless of the cause, a predictable and fully constitutional (assuming the amendment is ratified) process will be in place to ensure that all or nearly all the states and the American people will immediately and nearly continuously have representation, chosen by the persons they elected, to temporarily fill the spot until the people themselves can elect a replacement.

In this way, all the Article I duties are sustained, the political balance is not altered by assassins or by circumstances, special elections can be held in a responsible, reasonable time frame, and largely qualified people will be in place to carry the nation through the crisis. That is what happens if the Commission recommendations are put in place. And that should be reassuring to all those who love the Congress and believe the people deserve representation in that Congress.

Remote Assembly and Procedures Related to Continuity

Before closing, one other topic that should be addressed in response to today's hearing has to do with the conflation of the current discussion on continuity debates about the separate ongoing proxy voting mechanism in the House. It is understandable but unfortunate that despite the fact the Commission explicitly stated it does not take a position on the current use of proxy votes, the discussion of continuity provisions nevertheless, for some participants, provided a proxy forum from which to criticize proxy voting.

It is important, therefore, to be very specific and direct in stating once again here that in its report and recommendations pertaining to continuity, the Commission takes no stand and offers no recommendation regarding proxy voting. Indeed, the exact quote from Congresswoman Shalala's written testimony is presented here for those who may not have it readily available from the hearing:

"Recommendation to Address the Problem That Congress Cannot Meet

The Commission does not comment on the actions taken during the recent pandemic. But it notes that there could be some disaster in the future where everyone would agree that it is impossible to meet in person for extended periods of time.

To ensure that Congress could function during this crisis, the Commission recommends a constitutional amendment that would give Congress the power by law to provide for this scenario including the possibility of remote participation. However, this constitutional amendment would provide protections to ensure that remote floor proceedings would require the in-person and/or virtual presence of at least one half of each body (to meet the quorum requirement) and that members be provided notice and be guaranteed access to whatever mode of meeting that is envisioned in law."

I believe the Commissioners fully understand that the current practice, enacted in response to safety concerns caused by the pandemic, is considered controversial. This was acknowledged in the hearing not only in the written testimony but also in oral comments by Rep. Shalala, myself, and Ambassador Culvahouse. Nothing in the Commission Report or recommendations either endorses or criticizes proxy voting.

The Commission Report does, however, recognize the simple truth that circumstances may arise in which Congress urgently needs to convene and take action, but for a variety of reasons it may be either unwise, unsafe or physically impossible to do so. The Commission recognizes that Congress has indeed met during challenging times in our nation's history. But as one of the Members of Congress in today's hearing observed, the time in which a devastating decapitating

attack can be launched on the Capitol and all three branches of our federal government have, from the days of the founders to the present day, gone from “several months to several minutes”. One might well have added that it could actually take just several seconds, or less, depending on the weapon used and its location.

Recognizing that stark but indisputable reality, the Commission is seeking to fulfill Hamilton’s adage that the government must be able to “CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION”. Once again, those who would claim to defend the Constitution against any changes of the sort we are recommending may be in a position of asserting that either A. It is better for Congress not to meet at all in a time of acute national crisis, or B. That regardless of the threat or the risk, Congress should convene as it always has, physically in the same location, even if that means the Congress could be wiped out while doing so and, in the present situation, even if that means there is no valid mechanism for Congress to continue to function if a destructive event takes place. I would assert that the Constitution was never intended to be a suicide note.

It does not follow out of necessity or logic that because some members may have abused the current proxy procedure, therefore any and all remote participation of any sort will inevitably devolve into abuses. For those who are interested in learning more about how matters of profound importance have been managed effectively by other branches of our government, I urge them to observe the testimony of General David Petraeus as part of a “mock hearing” conducted with former members of Congress to study, and demonstrate, the potential of remote interactions during the early days of the COVID pandemic. A link to a video of that hearing is <https://medium.com/g21c/second-mock-hearing-convenes-experts-to-discuss-remote-proceedings-b9d9cd1a6f23>. General Petraeus’s testimony begins approximately at 14:45. It is truly enlightening and encouraging. The same hearing also included testimony from the British and Spanish parliaments who shared how their governments are integrating remote technologies into their proceedings.

The purpose of the Commission’s recommendations in the context of continuity is precisely to encourage the Congress to prepare in advance, with suitable procedures and rules, and where necessary constitutional mechanisms in place to ensure valid and fair proceedings in the event the choice becomes for Congress to not meet at all, be wiped out, or meet and fulfill its duties remotely.

This is not a stalking horse or camel's nose under the tent or any other metaphor for subterfuge or hidden intent and no such accusation or alarm is warranted. The Commission is simply recommending that Congress responsibly prepare for such a situation and make provisions to allow for some form of remote participation, the exact nature of which, is not specified by the Commission but left to the Congress to determine. Models exist within our own nation and from other governments showing how to do this. We should learn from and improve upon those models, but we should not ignore or reject them out of hand.

Continuity Is An Issue for All Three Branches

Finally, it must be emphasized that the Commission firmly believes it is the responsibility of Congress to take the recommended actions, or some reasonable variation thereof, to ensure its own continuity even in the worst imaginable situations. But Congress has a duty to not stop there. It is within the constitutional authority and responsibility of Congress to also provide for continuity of the Article II and Article III branches. The Commission is exploring those branches as well and urges the Congress to take up and provide for valid continuity measures for all three branches at the earliest practical date.

Speaking in conclusion, not on behalf of the Commission but as a former member of Congress and now a private citizen, as someone who has studied this matter in detail for twenty one years, and as a patriot who cherishes our Constitution and our Congress and wants both to be sound, resilient and to serve the American people, I believe the time to act is now. We have been relatively lucky thus far and barely avoided multiple possible crises. But we cannot rely on luck forever.

If Congress should refuse or fail to address its own continuity, and also refuses or fails to provide solutions for the other branches, then the Congress and its members will have failed in their sworn duty to uphold and defend the Constitution and assure representation to the American people.

That would be a tragedy for Congress, for the American people, and for the free world that looks to us as a beacon and a model. As that model for the world, we must set an example of how to prepare for and deal with even the most difficult challenges. And as that beacon of freedom, we must ensure the light we cast in Congress cannot be extinguished, even for a moment.

Brian Baird - April, 2022

HOUSE CONTINUITY OFFICERS

(Pitts-Rogers Discussion Draft/April 2022)

Foundations:

- The House of Representatives shall choose their Speaker and other Officers...(U.S. Constitution. Art. 1, § 2).
- The Clerk of the House presides of the start of each Congress, including making parliamentary rulings, until a Speaker is elected.
- The Speaker does not have to be an elected Member of House of Representatives, and can vote on legislation.

Proposal:

- House of Representatives could create *Continuity Officers* to deal with the catastrophic death of every Member of the House.
- Two Continuity Officers elected from each state, not appointed, according to state law election requirements for a period not to exceed six years.
- Continuity Officers shall constitute the membership of the House of Representatives in the event *all* the elected and sworn Members of the House are killed in a catastrophic event.
- Each new Congress, on opening day, the House choses to seat as Continuity Officers of the House the persons chosen from each state on a list provided by law.
- Continuity Officers may exercise all powers of Members of Congress during their service, including voting on legislation, and shall have use official offices, staff, and resources during their time of service.

- A quorum is 51 Continuity Officers, and they shall elect a Speaker.
- Continuity Officers continue to serve until expedited special elections replenish the elected Representatives of the House.
- Any legislation enacted with the votes of such a House shall sunset within two years of enactment, unless subsequently enacted by the Members of the reconstituted House.
- The House shall be able to provide for the commencement of business at the start of a new Congress and that power includes the power to authorizing someone to swear in new Members and to commence business.

Qualifications:

1. Minimum Age of twenty-five years;
2. Seven years a Citizen of the United States;
3. Inhabitant of the state in which he or she shall be chosen;
4. Not a currently a seated Senator or Representative.

